Petition

81-1237

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In The

Supreme Court of the United States

October Term, 1981

No.

PETER ANGELILLI,

Petitioner,

—*vs.*—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GILBERT S. ROSENTHAL
Attorney for Petitioner
401 Broadway
New York, New York 10013
(212) 226-7971

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QUESTIONS PRESENTED

1. Whether the Opinion sought to be reviewed decided a federal question in a way in conflict with Stirone v. United States, 361 U.S. 212 (1960)?

2. Whether the abstention doctrines apply to criminal cases -- a yet unsettled question of law?

3. Whether the Government's use of "RICO" in the case at bar exceeded its statutory scope and purpose?

4. Whether Petitioner Angelilli was denied a fair Trial by the failure of the Court, at nisi prisus, to have granted a severance?

5. Whether this Court should, once and for all, resolve the issue left unsettled in United States v. White, 401 U.S. 745, as to whether Court Orders are required for electronic surveillance where only one party to such surveillance has knowledge thereof and consents thereto?

6. Whether the Indictment should have been dismissed because "RICO" and "RICO conspiracy" do not apply to "criminal venture" types of enterprises and the joining of these Counts violated Rule 8(b) of the Federal Rules of Criminal Procedure?

7. Whether the conjoining of so many Defendants into a single "RICO" and single conspiracy to violate "RICO" Charge necessarily created a prejudicial spillover which denied a fair Trial and due process to the Petitioner herein?

8. Whether the Civil Court of the City of New York is an enterprise within the purview of the "RICO" statute?

9. Whether Petitioner was denied a fair Trial?

Questions Presented

10. Whether the Concurring Opinion of Judge Friendly of the Circuit Court, concluding that no "RICO" violation existed and thus a conviction on "RICO" should have been reversed, constitutes a basis for certiorari herein?

PARTIES

The parties in the United States Court of Appeals for the Second Circuit were the Petitioner, as well as William Butler, Donald Irish, and Donald Ribotsky.

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PETER ANGELILLI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, PETER ANGELILLI, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit, entered September 4th, 1981.

OPINION BELOW

A copy of the Opinion of the United States Court of Appeals for the Second Circuit, decided the 4th day of September, 1981, is annexed hereto as Appendix A.

JURISDICTION

The Judgment of Conviction was entered on the 7th day of November, 1981, convicting Petitioner of violating the RICO statute, conspiracy to violate the RICO statute [18 U.S.C. §§ 1962(c) and (d)] and the Hobbs Act, after Trial before Mishler, D.J. and a Jury.

The other co-Defendants were likewise convicted of the same charges and were also convicted of mail fraud. The Indictment, in essence, alleged that the Defendants, including Petitioner herein, all of whom were New York City Marshals, conducted auction sales of the property of judgment-debtors and sold the property of judgment-debtors for less than the true value. The Indictment further alleged that these Marshals received payments for so doing and that they used the mails in connection with this alleged scheme.

The Order and Judgment of Affirmance of the United States Court of Appeals for the Second Circuit is dated the 4th day of September, 1981, and the Opinion in connection therewith is annexed hereto as Appendix A. An Order Denying a Rehearing was filed by the United States Court of Appeals for the Second Circuit on the 5th day of November, 1981; but, a Stay of Mandate was granted pending the filing of this Petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution, Due Process Clause, is involved herein. The principal statutory provisions, so far as pertinent, are 18 U.S.C. §§ 1961(4), 1962(a), 1962(b), 1962(c), and 1962(d), the pertinent portions ofwhich are set forth in the Appendix hereto.

STATEMENT OF THE CASE

As stated in the Order and Judgment of the United States Court of Appeals:

> "Defendants were four of the approximately eighty New York City marshals appointed by the Mayor of the City of New York as officers of the City's Civil Court, who are empowered, inter alia, to enforce judgments issued by that. As part of the enforcement function, each marshal, upon request of a Civil Court judgment creditor, may levy upon and sell at publicly advertised auctions the property of a Civil Court judgment debtor. The auctions are conducted either by the marshal himself or by an auctioneer hired by the marshal. After a sale the marshal is entitled to deduct certain statutorily authorized fees and must remit the remainder of the proceeds, up to the amount of the judgment, to the attorney for the judgment creditor; any proceeds in excess of the judgment debt and statutory fees are to be remitted to the judgment debtor.
>
> "In 1976 an investigation was begun

into the bona fides of the marshals' auction sales. New York City Department of Investigation Detective Edward Gruskin assumed an undercover identity and began attending auction sales as a cash buyer. The investigation culminated in a 25-count indictment in 1978 against eleven marshals, including the four appellants, and two auctioneers for various violations of federal law on account of sales of debtors' property at artificially deflated prices. Seven of the marshals and both auctioneers pleaded guilty to certain defenses, leaving only Angelilli, Butler, Irish, and Ribotsky to be tried. Each of the four defendants was charged in four counts: (1) participating in the affairs of the Civil Court through a pattern of racketeering (RICO § 1962(c); (2) conspiring to so participate (RICO § 1962(d); (3) extortion under color of official right; and (4) mail fraud. The indictment alleged that the pattern of racketeering activity included multiple acts of extortion and mail fraud; as the case went to the jury the indictment alleged with specificity ten extortionate transactions and five fraudulent mailings by Angelilli, eight extortionate transaction and four fraudulent mailings by Butler, nine extortionate transactions and four fraudulent mailings by Irish, and four extortionate transactions and three fraudulent mailings by Ribotsky. The conspiracy count charged a conspiracy among the four defendants, nine named but unindited co-conspirators, and certain unnamed co-conspirators; pretrial disclosure by the government revealed the names of twenty-nine persons in the last category."

On June 30th, 1980, the Trial commenced before the Honorable Jacob Mishler and a Jury in Brooklyn, New York and concluded with a verdict of guilty against all of the Defendants who were tried (Angelilli, Butler, Irish, and Ribotsky), on all counts, except insofar as Angelilli was concerned, who was acquitted of the Mail Fraud Count.

On November 7th, 1980, the Court imposed the same sentence on each Defendant: one year and one day on each count to be served concurrently, execution of sentence stayed pending Appeal.

REASONS FOR GRANTING THE WRIT

I

THE OPINION SOUGHT TO BE REVIEWED DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT: THE OPINION SOUGHT TO BE REVIEWED ALLOWED THE COURT'S CHARGE TO THE JURY TO PERMIT AN IMPERMISSIBLE EXPANSION UPON THE BASIS OF A HOBBS ACT CONVICTION IN DIRECT VIOLATION OF STIRONE v. UNITED STATES, 361 U.S. 212 (1960); IN THE ABSENCE OF EVIDENCE THAT THE VICTIMS OF THE EXTORTIONS WERE INVOLVED IN INTERSTATE COMMERCE, THE CHARGE UNFAIRLY BROADENED THE INTERSTATE COMMERCE INVOLVEMENT TO INCLUDE OTHERS.

Insofar as the Petitioner is concerned, Count III of the Indictment alleged eleven (11) separate Hobbs Act violations relating to eight (8) different victims. The Court let ten (10) of those Charges go to the Jury and the Jury, under special Supplement to the Memorandum of Verdict requested by the Court, found four (4) of those acts "not proved." The conviction of Petitioner, therefore, rests upon six (6) separate acts and six (6) separate victims.

The Government's theory was that it was these victims -- the buyers at the Marshals' auction sales -- "whose activities affected interstate commerce." [Indictment: Count III, ¶3]

Set forth below in the first column are the "proved" victims -- the victims of acts "proved" to the satisfaction of the Jury to have taken place. Directly under each name is the date, place and amount involved for each act. Set forth immediately in the second column are the references to the testimony with Trial Transcript annotations of the scope of each victim's business activities:

Victim	Business Activities
1. Edward Gruskin	
12/16/76 Bride's Place $100 1/27/77 Blake Discount $100 4/14/77 Mr. David $250	Gruskin testified that he was a New York City Housing Authority Police Officer on assignment to the New York City Department of Investigation and, in an "under-cover" capacity, attended New York City Marshals' sales within New York City. T. 2638-2642.* No evidence was offered as to any business activities outside of New York City.

* Such references are to the Trial Transcript.

Victim		Business Activities
2. Alan Kanofsky		
1/13/77 Artco (attempt)	$500	Although Kanofsky did not testify, the Hobbs Act Violation relating to him was covered in Gruskin's testimony. No evidence was offered as to any business activities of Kanofsky outside the City limits.
3. Eliot Millman		
1/13/77 S.K. Fads	$375	Millman testified to being an Appraiser, buyer at auction sales and a New York City Department of Consumer Affairs Licensed Auctioneer. T. 1561-1562. No evidence was offered as to any business activities outside of New York City.
4. Barry Stampler		
3/16/78 Portnoy's	$2,000	Stampler testified to being a Partner in the firm of Active Auctioneers and Liquidators. T. 587. No evidence was offered as to any business activities of either Stampler or his firm

(Stampler con't) outside of New York City, except for unrelated illegal acts.

It is well established that there are two (2) essential elements of a Hobbs Act Violation: interference with interstate commerce and extortion. Here, the essential element of interference with interstate commerce was not the subject of any relevant evidence and, we therefore respectfully submit, that there was no Hobbs Act Violation committed.

The District Court's very jurisdiction under Section 1951 depends upon Congress' power to regulate interstate commerce [United States v. Augello, 451 F.2d 1167, 1169 (2d Cir. 1971), cert. denied, 405 U.S. 1070 (1972); United States v. Gill, 490 F.2d 233, 236-37 (7th Cir. 1973), cert. denied, 417 U.S. 968 (1974); United States v. Mitchell, 463 F.2d 187, 193 (8th Cir. 1972), cert. denied, 410 U.S. 969 (1973); United States v. Massei, 390 F.Supp. 1098, 1104 (W.D. Pa.), cert. denied, 423 U.S. 1014 (1975)]. Thus, interference with interstate commerce is an essential element of any Hobbs Act Violation [Stirone v. United States, 361 U.S. 212, 218 (1960)].

Accordingly, interstate involvement is an essential element of any Hobbs Act Violation and the interstate involvement upon which the conviction is based must be the same interstate commerce involvement alleged in the Indictment [i.e., the buyers]. Any failure to so prove falls short of proving a Hobbs Act Violation [Stirone v. United States, supra; United States v. Addonizio, 451 F.2d 49 (3rd Cir. 1972), cert. denied, 405 U.S. 936, 92 S. Ct. 949, 30 L.Ed.2d 812, rehearing denied, 405 U.S. 1048, 92 S.Ct. 1309, 31 L.Ed.2d 591; United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973), cert.

denied, 414 U.S. 1062, 94 S.Ct. 570, 38 L.Ed.2d 469 (1974)].

In reviewing this point, the Second Circuit stated that it found adequate evidence to support a conclusion that commerce was affected. The Court went on to state that it felt that one of the four persons who purchased from Petitioner testified that he "sometimes" sold to out-of-state buyers the merchandise he had bought at Marshals' auctions and that, in any event, since "the boys" acted as a unit in purchasing at the collusive price at the Marshals' auctions, a Marshal sale to one of "the boys" who himself happened not to engage in interstate transactions would nevertheless have the required effect on interstate commerce since he was "kippered" with those who dealt interstate. There was no evidence whatsoever adduced at the Trial demonstrating that any of the merchandise purchased by any of the buyers involved with Petitioner was involved in interstate commerce or that interstate commerce was affected by any action taken by the Petitioner herein. In permitting interstate commerce involvement of others to justify a holding that the interstate commerce essential element was met would be to deviate from the theory of the Indictment as charged by the Grand Jury.

As previously noted, the Government's theory of prosecution with regard to the Hobbs Act Charges is that it was the buyers at the Marshals' sales, from whom the Marshals took money "whose activities affected interstate commerce." [Indictment: Count III, ¶3] In the Rico Conspiracy Count, it was the enterprise -- the Civil Court of the City of New York -- which "was engaged in and the activities of which effected interstate commerce" [Indictment: Count I, ¶5]. The Court admitted evidence on any interstate commerce involvements. Thus, the Jury must have convicted the Defendants on the basis of evidence of interstate commerce involvement by other

than the buyers involved in the specific extortion instances. Therefore, all Defendants were convicted of a Charge the Grand Jury never made against them. This, alone, is fatal error and the Order and Judgment of the United States Court of Appeals for the Second Circuit affirming the Judgment below, therefore, decides the federal question in a way in conflict with the applicable Decisions of this Court and specifically the Decisions of this Court in Stirone v. United States, 361 U.S. 212 (1960); Cole v. Arkansas, 333 U.S. 196; and DeJonge v. Oregon, 299 U.S. 353.

Petitioner asked the Court to Charge that the Jury can only convict if they find that he induced his victim to part with property, by extortion, and "that in so doing, interstate commerce was delayed, interrupted or adversely affected." [Request to Charge of Defendant Peter Angelilli: Essential Elements, p. 42] The Court refused this request and simply stated that "(t)he aforementioned acts affected interstate commerce and I defined what affecting interstate commerce means," referring back to the Rico Conspiracy portion of the Charge [Transcript, p. 4857]. Petitioner's counsel objected to "permitting the Jury throughout the case to speculate as to whether or not there was anything involving interstate commerce" [Transcript, p. 4877].

Thus, in the clear absence of any evidence tending to show interstate involvement on the part of the victims of Petitioner's so-called extortions, coupled with the introduction of evidence of interstate commerce involvement on the part of the Civil Court of the City of New York -- the enterprise -- the Charge to the Jury should have differentiated between the two interstate commerce involvements so as to avert any possibility of a Hobbs Act Conviction predicated upon evidence of Civil Court interstate involvement -- the Charge which the Grand Jury never made. Stirone stands for the principal that

such failure to Charge constitutes reversible error as a matter of law and the Order and Judgment below clearly fly in the face of Stirone.

Once an Indictment has been returned, its Charges may not be broadened through amendment except by the Grand Jury itself [Ex Parte Bain, 121 U.S. 1]. In Bain, the Court deleted certain allegations from the Indictment so that the Defendant could be convicted in the absence of proof of those allegations. In reversing that ruling, this Court stated:

> "If it lies within the providence of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to the suggested charges, the great importance which the common law attached to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer' may be frittered away until its value is almost destroyed." 121 U.S. 1, 10

Mr. Justice Miller speaking for the Court, went on to state:

> "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney . . ." 121 U.S. 1, 13

Ex Parte Bain, as the law today, stands for the principal that no Court can permit a Defendant to be tried on Charges that are not made in the Indictment against him [Stirone v. United States, supra; United States v. Norris, 281 U.S. 619, 622].

The Trial Court did just that in this case and the Circuit Court of Appeals affirmed. The Hobbs Act Count of the Indictment here cannot fairly be read as charging interference with interstate commerce as a result of the extortions' adverse effect upon the Civil Court of the City of New York, an enterprise allegedly involved in interstate commerce. The Grand Jury who returned the Indictment here was satisfied to Charge that each Marshal's conduct in connection with each purported extortion adversely affected the victim of the extortion -- the buyers at the sales -- "whose activities affected interstate commerce" [Indictment: Court III, ¶3]. On the basis of the Record before us, no one can speculate whether or not the Grand Jury would have been willing to Charge that the Marshals' conduct with regard to the Extortion Charges had an adverse impact on the Civil Court of the City of New York and thereby interfered with interstate commerce. It can be said with certainty that with a new basis for conviction added, and in the absence of any evidence tending to show interstate commerce involvement on the part of the buyers at the auction sales, the Marshals, the Defendants, were convicted solely on the de facto amendment to the Indictment. As in Stirone, although the Trial Court did not permit a formal amendment to the Indictment, the affect of what it did was the same. The Interstate Commerce Charges with respect to the RICO Counts and the reference to them later with regard to the Hobbs Act Charge, in the face of Requests to Charge to the contrary and the formal objection to the

Charge as made, is neither trivial, useless or innocuous [Stirone v. United States, supra; Ford v. United States, 273 U.S. 592, 602; Goto v. Lane, 265 U.S. 393, 402].

Again, as in Stirone, the variance between pleading and proof destroyed the Defendants' substantial right to be tried only on Charges presented in an Indictment returned by a Grand Jury. This deprivation of a basic constitutional right constitutes reversible error as a matter of law [Stirone v. United States, supra; Berger v. United States, 295 U.S. 78] and the affirmance thereof by the Circuit Court of Appeals flys clearly in the face of Stirone.

It has always been a fundamental objective of the requirement that a man be indicted by a Grand Jury that his jeopardy to Charges of a Crime be initiated by a group of his fellow citizens acting independently of both the Prosecuting Attorney and the Trial Judge [Ex Parte Bain, 121 U.S. 1, 11; Stirone v. United States, supra].

Here, the Trial Court accomplished indirectly that which it would not hope to accomplish directly and defeated this basic protection of Indictment by Grand Jury by the simple device of subjecting the Defendants to prosecution for interfering with interstate commerce in the manner in which the Grand Jury did not Charge.

Here, as with Bain and Stirone, we cannot know whether the Grand Jury would have included in its Indictment a Charge that the Extortions Affected Interstate Commerce via the Civil Court route. Here, because of the Court's admission of evidence as to the other interstate commerce factors and in the absence of any evidence tending to show interstate commerce involvement on the part of the buyers, it

is manifestly clear that the Defendants were convicted on a Charge the Grand Jury never made against them. Such constitutes reversible error as a matter of law and the Decision of the Circuit Court of Appeals affirming the Judgment below violates this Court's principals as enounciated in Stirone v. United States, supra.

Even, assuming arguendo, that there was some interstate commerce involvement demonstrated somewhere in the Trial Level as with regard to one of the victims of Petitioner's extortions, one would still have to speculate as to whether the Jury was confused with the various types of interstate commerce involvements discussed at the Trial and it is impossible to ascertain at this point in time which interstate commerce involvements were relied upon by the Jury in finding the Petitioner guilty of the Hobbs Act Violation.

It is clear that the Decision of the United States Court of Appeals below has decided a federal question in conflict with the applicable Decisions of this Court.

The importance of the Hobbs Act Conviction becomes greater when we consider that if the Hobbs Act Conviction is reversed, the substantive RICO Court, as alleged in Count II of the Indictment was not committed. In Count II of the Indictment, the Grand Jury Charge the Substantive Violation of 18 U.S.C. § 1962 in that the Defendants are alleged to have affected commerce and the movement of goods and services in commerce by the unlawful obtaining of property of others. This Count specifically predicates the requisite pattern of racketeering activity consisting of two or more offenses by specifying the same overt acts alleged as the Hobbs Act Violations of the Mail Fraud Violations. It is because the Petitioner was acquitted of all of the

Mail Fraud Violations that his conviction of Count II of the Indictment rests solely upon his conviction of the Hobbs Act Violation. Accordingly, if the Hobbs Act Conviction is reversed, the substantive RICO Count, as alleged in Count II of the Indictment, was not committed.

The leading case on point is United States v. Huber, 78 CR 679 (S.D.N.Y. 1978), affirmed, 603 F.2d 387 (1979). However, United States v. Stofsky, 409 F.Supp 609 (S.D.N.Y. 1973), affirmed, 527 F.2d 237 (2d Cir. 1975); United States v. Ladmer, 429 F.Supp. 1231 (E.D.N.Y. 1977); and United States v. White, 386 F.Supp. 882 (E.D. Wisc. 1974) are also instructive.

Accordingly, should this Court reverse on the Hobbs Act Conviction, the substantive RICO Count, as alleged in Count II of the Indictment, was not committed and must likewise be reversed. In the alternative, it is respectfully submitted that acquittal on the Hobbs Act Violation and Conviction of the RICO substantive Counts would be repugnant.

Petitioner, unlike the other Defendants, offered substantial testimony proving that his sales of Judgment-Debtor's property was not at artificially deflated prices. Owners of the companies whose property was sold at Petitioner's sales testified that the prices at which their property was sold were quite fair. Considering that ordinarily Judgment-Debtors would be hostile to a City Marshal who "sold them out," the testimony here of a whole series of Judgment-Debtors that the sale prices were fair is quite significant.

The significance of this unrefuted testimony is enhanced when read in conjunction with the Indictment which alleged a conspiracy to, inter alia, sell the property of Judgment-Debtors at artifically deflated prices.

Clearly, the Opinion Below decided a federal question in conflict with the applicable Decisions of this Court.

II

THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM HEARING THE CASE; THE FAILURE TO DO SO VIOLATED SETTLED PRINCIPLES OF COMITY, FEDERALISM AND EQUITABLE RESTRAINT.

The Hobbs Act is patterned after New York's corresponding penal statute; the crimes charged were local in nature; the investigation was conducted by the New York City Department of Investigation; the under-cover Agent was a New York City Housing Police Officer; the Defendants were New York City Marshals.

While generally thought of as a civil doctrine, it is not so limited. Since 1941, there has been considerable recognition of circumstances under which a Federal Court may decline to proceed though it has jurisdiction under the Constitution and the statutes. Two of these abstention doctrines have developed and are relevant here (1) to avoid needless conflict with the administration by a State of its own affairs; and (2) to ease the congestion of the Federal Court Docket.

In the first abstention doctrine, the Federal Courts are asked not to issue Declaratory Judgments as to State Taxes [Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 87 L.Ed. 1407, 63 S.Ct. 1070 (1943)]; nor interfere with a large-scale highway program simply to protect a landowner's right to compensation [Martin v. Creasy, 360 U.S. 219, 3 L.Ed.2d 1186, 79 S.Ct. 1034 (1959)]; nor take jurisdiction in a receivership proceeding where the State has a comprehensive procedure for liquidation of corporations of the sort involved [Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 79 L.Ed. 841, 55 S.Ct. 380 (1935)].

In Burford v. Sun Oil Co., 319 U.S. 315, 87 L.Ed 1424, 63 S. Ct. 1098 (1943), this Court held that the Federal Court should have dismissed the Complaint in a case involving Proration Orders in Texas oil fields, on the ground that the issues involved a specialized aspect of the complicated regulatory sustem of local law, which should be left to the Local Administrative Bodies and Courts. Subsequently, in Alabama Public Service Commission v. Southern R. Co., 341 U.S. 341, 349, 95 L.Ed. 1002, 71 S.Ct. 762 (1951), this Court said:

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights."

In the second abstention doctrine, there is ambiguity in the law clearly existent today. This doctrine requires abstention to serve the convenience of the Federal Courts. Although this Court had held that a federal action may not "be dismissed or referred to State Courts" because the Federal Court "considers itself too busy to try it" [Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 344, 46 L.Ed.2d 542, 96 S.Ct. 584 (1976)], Charles Alan Wright believes that there is enough ambiguity in that statement that the propriety of this second doctrine cannot be regarded as finally settled [Wright, Law of Federal Courts, Third Edition, p. 228].

Clearly, we have here a current and important question of Federal Law which has not been, but should be, settled by this Court.

III

THE INDICTMENT HEREIN, AS JUDGE FRIENDLY INDICATED IN HIS CONCURRING OPINION IN THE COURT BELOW AND THE PROOF ADDUCED PURSUANT THERETO, WERE INSUFFICIENT TO HAVE WARRANTED CONVICTION OF "RICO" VIOLATIONS. THIS COURT SHOULD CLARIFY THE ESSENTIAL REQUIREMENTS OF THE "RICO" STATUTE SINCE IT IS BEING USED TO A VERY SIGNIFICANT EXTENT BY PROSECUTORS THROUGHOUT THE COUNTRY. [1]

A prosecution under the Racketeer Influenced and Corrupt Organizations statute ("RICO"), 18 U.S.C. § 1961 et seq., presents the basic issue: "What must be charged in a RICO Conspiracy Count to make it legally sufficient?"

We submit that the minimum requirement is that each Defendant must be charged with agreeing to commit two or more specific predicate crimes, as well as agreeing to participate in the conduct of an enterprise's affairs, through a pattern of racketeering activity.

While the statute asserts that two or more predicate acts of racketeering constitutes a "pattern of racketeering", it does not make clear the extent of activity necessary on the part of each conspirator.

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1 This Point, and those following, are substantially the same -- almost word-for-word -- of those submitted by Petitioner Donald Ribotsky, a co-Defendant and co-Appellant, in view of this Court's rule prohibiting the joining in the Petition of another Petitioner by reference.

In the case at bar, Petitioner Angelilli was linked, at most, with one discernable act of a Hobbs Act Violation involving an individual who the Court of Appeals stated was involved in interstate commerce. However, as previously noted, one would still have to speculate as to whether the Jury was confused with the various types of interstate commerce involvements discussed at the Trial and it is impossible to ascertain at this point in time which interstate commerce involvements were relied upon by the Jury in finding Petitioner guilty of the Hobbs Act Violation.

This becomes particularly important in view of the verdict of "Not Guilty" on the Mail Fraud Charges leaving the the RICO convictions based solely upon the Hobbs Act Violation for the RICO convictions were necessarily dependent upon this same alleged transgression.

Thus, we maintain that the Government failed to show the actual commission of two predicate acts by each Defendant in order to demonstrate their agreement to participate in the conspiracy.

Guilt by association is the thrust of what occurred in the case at bar.

In Krulewitch v. United States, 336 U.S. 440 at 457, after a survey and criticism of the Federal Law of Conspiracy, Justice Jackson declared:

> "There is, of course, a strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evildoing without the dangers to the liberty of the individual and the integrity of the judicial process that

are inherent in conspiracy charges ... And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction." (Emphasis added.)

One of Justice Jackson's criticisms of the Federal Law of Conspiracy was that it reduced the Sixth Amendment right to trial to a sham. Referring to Hyde v. United States, 225 U.S. 347 (1912), he said:

> "Mr. Justice Holmes, on hehalf of himself and Justices Hughes, Lurton and Lamar, wrote a vigorous protest which did not hesitate to brand the doctrine as oppressive and as 'one of the wrongs that our forefathers meant to prevent.'" at 452-3

In Kotteakos v. United States, 328 U.S. 750, 773 (1946), where, as here, a single conspiracy was alleged, but multiple conspiracies were proved, that Court, reversing for this reason, stated that the proceedings of a mass trial "are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass", and continued:

> "... Wholly different is it with thosewho join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy.

They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trial. About them we dare not become careless or complacent when that fashion has become rampant over the earth."

The Court in Krulewitch continued, explaining:

"The naive assumption that the prejudicial effects can be overcome by instructions to the jury, c.f., Blumenthal v. United States, 332 U.S. 539, 559, all practicing lawyers know to be unmitigated fiction." Krulewitch v. United States, 336 U.S. 440, 453 (1949).

"... the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." (L. Hand, J.) Nash v. United States, 54 F.2d 1006, 1007 (C.A. 2, 1932).

IV

THE MOTIONS FOR SEVERANCE MADE BY ANGELILLI SHOULD HAVE BEEN GRANTED BECAUSE THERE WAS A MISJOINDER OF HIM AS A DEFENDANT, WHICH WAS HIGHLY PREJUDICIAL.

Since Angelilli was really connected with only one alleged violation where the Court of Appeals found interstate commerce involvement; but numerous acts on the part of the other Defendants were introduced, there was clearly a misjoinder as to him. There was a failure in the Conspiracy Count to establish a nexus between Angelilli and two or more predicate crimes constituting a "pattern of racketeering activity".

In the light of this Court's recent Decision in United States v. Turkette, ___ U.S. ___, 29 Cr. L. 3086 (1981), a "RICO" conspiracy must charge an "enterprise" and "pattern of racketeering activity" separately. These elements are defined in the statute; in particular, Section 1961(5), wherein, the following language appears: "Pattern of racketeering activity" requires at least two acts of racketeering activity.

The statute, however, does not make clear the extent of the activity in which each defendant must engage to be culpable as a "RICO" conspirator.

In other words, the Court must decide whether it is necessary that "RICO" conspiracy Defendants agree that someone in the enterprise will commit two predicate crimes.

This Court should also determine whether it is necessary to prove that each member of the conspiracy agreed to commit two such acts individually

or whether it is necessary that each member actually committed two such acts individually.

The foregoing enigmas have never been explained by this Court.

Cf., United States v. Elliot, 571 F.2d 880 (5th Cir. 1978).

The Elliot Court had said that while the gargantuan criminal scheme involved there could probably not be charged as a single conspiracy under pre-RICO concepts, a "RICO" conspiracy could exist, but it went on to say that each conspirator must have "objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes". But it has also been held that conspirators need not have accomplished their underlying criminal goals to be found guilty of conspiracy (See, United States v. Cruz, 568 F.2d 781, 782-83 (1st Cir. 1978).

Requiring one to knowingly join an enterprise and agree to commit two or more predicate crimes provides sufficient protection to those who might otherwise be convicted through guilty by association. It is therefore patent that a "RICO" Conspiracy Count can be established only if the Government, at a very minimum, establishes beyond a reasonable doubt that each Defendant agreed to commit two or more specified predicate crimes, in addition to charging an agreement to participate in the conduct of an "enterprise's" affairs through a pattern of racketeering activity. (See, United States v. Winter, ____ F.2d ____, (1st Cir. 10/31/81), 30 Cr. L. 2150, 2151.)

Judge Friendly's partial dissent and partial concurrence specifically declares that the "New

York Civil Court" cannot be deemed an "enterprise" within the meaning of 18 U.S.C. § 1962(b).

This incisive Opinion distinguishes United States v. Turkette, supra, 49 L.W. 4743, noting that this Court criticized the First Circuit for reading "legitimate" into the congressional definition of "enterprise". The Judge noted, however, that the question in the case at bar is whether there is any justification for expanding the term to include something that would normally be deemed to fall outside it. Thus, Judge Friendly, explains:

> "Conceivably the group of marshals who engaged in the sordid activities described by the majority could be deemed an 'enterprise'. But that was not what the indictment charged or what the jury was told it must find in order to convict. It is of no consequence, as the majority urges, that obstruction of law enforcement is included in the definition of 'racketeering activity' in § 1961(1). As the Court said in Turkette, supra, 49 L.W. at 4745:
>
> > 'The "enterprise" is not "the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.'
>
> For these reasons, as well as others expressed by Judge Swygert dissenting in United States v. Graywacz, 603 F.2d 682, 690 (7d Cir. 1979), cert. denied,

446 U.S. 935 (1980), I would vacate the convictions under RICO, 18 U.S.C. § 1962 (c) and (d), but would allow those under the Hobbs Act, 18 U.S.C. § 1951, and the mail fraud statute, 18 U.S.C. § 1341, to stand."

V

THE PROOF IN THE CASE AT BAR DOES NOT ESTABLISH PARTICIPATION IN A "PATTERN OF RACKETEERING" BY PETITIONER ANGELILLI. THIS COURT SHOULD CLARIFY THE AMORPHOUS AND ENIGMATIC DEFINITION OF THE STATUTE [18 U.S.C. §§ 1962(c) and 1961(5)].

To the extent that Courts permitting illegal enterprises have eliminated the enterprise element from Section 1962(c), they have transformed that subsection into a direct prohibition against the commission of a pattern of racketeering activity.

Section 1961(5) does not actually define a "pattern of racketeering activity", but states that it "requires at least two acts of racketeering activity", one of which occurred after the effective date of this chapter and the last of which occurred within ten years "after the commission of a prior act of racketeering".

It should be noted in this context that 18 U.S.C. § 1961(5) may violate the constitutional prohibition on ex post facto laws (U.S. Const. Art. 1, § 9, Cl. 3) because it permits the prosecution of activities that occurred prior to its effective date [cf., United States v. Herman, 589 F.2d 1191, 1198 (3rd Cir. 1978), cert. denied, 441 U.S. 913 (1979); United States v. Brown, 555 F.2d 407, 418-21 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978)

and United States v. Campanale, 518 F.2d 352, 357, 365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976)].

In accordance with Section 1961(5), the Courts have insisted that one isolated racketeering act does not constitute a "pattern" [United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976); United States v. Campanale, supra, and United States v. Ladmer, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977)].

The more significant and complex question that arises is whether the commission of two or more acts of racketeering will always constitute a "pattern". The report of the Senate Judiciary Committee on the proposed Organized Crime Control Act (5 Rep. No. 617, 91st Cong. 1st Sess. 215 at 158) cautioned that the target of Title IX is thus not sporadic activity.

The infiltration of legitimate business normally requires more than one racketeering activity, and the threat of continuing activity, to be effective. It is this factor of continuity plus relationship which combines to produce a pattern.

See, Senator McClellan's vigorous assertion that the commission of two racketeering acts does not establish a pattern in the absence of a relationship between the acts [116 Cong. Rec. 18940, 91st Cong. 2d Sess. (1970); see, House Hearings on Organized Crime Control on S.30 and Related Proposals before Sub-Committee No. 5 of the House Committee on the Judiciary, 91st Cong. 2d Sess. 170 (1970) - Statement of Attorney General Mitchell].

The hearings established that it was prevention of infiltration which was the principal goal. Indeed, few statements in legislative history rebut the restricted view. (See, Tarlow, "Rico: The New Darling of the Prosecutor's Nursery",

49 Fordham L. Rev. 165, 210-220).

VI

SUBSTANTIAL ELECTRONIC SURVEILLANCE WAS CONDUCTED IN THE CASE AT BAR BY USE OF A BODY RECORDER PLACED ON DETECTIVE EDWARD GRUSKIN, WHO WAS AN UNDERCOVER AGENT POSING AS A BUYER AND AUCTIONEER KNOWN AS "EDWARD GROSSMAN". SUPPOSEDLY GRUSKIN CONSENTED TO THE USE OF ELECTRONIC LISTENING DEVICES IN CONVERSATIONS WHICH HE HAD WITH CERTAIN OF THE DEFENDANTS. WHILE ALLEGEDLY JUSTIFIED UNDER UNITED STATES v. WHITE, 401 U.S. 745, THAT CASE WAS PRIOR TO KATZ v. UNITED STATES, 389 U.S. 347, AND WHITE WAS A MERE PLURALITY OPINION OF THE SUPREME COURT. THUS BOTH THE FOURTH AMENDMENT AND THE PETITIONER'S "REASONABLE EXPECTATION OF PRIVACY" RENDERED THE ELECTRONIC SURVEILLANCE UNCONSTITUTIONAL AND INADMISSIBLE WITHOUT COURT ORDERS.

The Government elected to use electronic surveillance in this case, probably in an attempt to corroborate the statements of their single most important witness, Gruskin.

The use of electronic surveillance where only one party consents to the eavesdropping has been employed very widely since the Supreme Court's Decision in United States v. White, 401 U.S. 745. It, of course, had also been used previous thereto, but many law enforcement agencies apparently look upon White as authorization or carte blanche to use this method of electronic surveillance.

It is respectfully contended that White was a Plurality Opinion of the Supreme Court of the United States and was decided prior to Katz v. United States, 389 U.S. 347, 364.

Just a mere plurality of the Supreme Court voted to save the "misplaced confidence" doctrine of On Lee v. United States, 343 U.S. 747 and Lopez v. United States, 373 U.S. 427.

This "misplaced confidence" exception to the normal warrant requirement is inconsistent with the "reasonable expectation of privacy" standard of Katz v. United States, 389 U.S. 347, and we maintain should therefore be abolished. [See, Holmes v. Burr, 486 F.2d 55 (9th Cir. 1973), cert. denied, 414 U.S. 1116.]

It will be recalled that Justice Black's cryptic concurrence in United States v. White, supra, mentioned the fact that it did not apply since this was pre-Katz eavesdropping.

Justice Black cast the swing vote in United States v. White, and his concurrence in the judgment of the Court was for the reason set forth in his dissent in Katz v. United States, 389 U.S. 347, 364. However, he also noted "his adherence" to "his views expressed in Linkletter v. Walker, 381 U.S. 618." In Linkletter, Mr. Justice Black maintained that Mapp v. Ohio, 367 U.S. 643, should have been applied retroactively.

It must be borne in mind that in his concurrence in United States v. White, Justice Black reasserted the position which he had taken in Katz, namely that electronic surveillance was not within the ambit of the Fourth Amendment.

In Katz v. United States, however, the Supreme Court made it very clear that seizure of the spoken word was within the purview of the Fourth Amendment and, consequently, Black's concurring and controlling fifth vote is inapplicable in view of Katz v. United States.

It is argued that: (1) electronic recording produces more reliable evidence than human recollection; (2) that law enforcement authorities need unhampered electronic surveillance to protect us from crime; and (3) that the exclusion of evidence obtained in this way hurts society. These arguments do not hold up.

Evidence obtained by machine is not necessarily more reliable than human recollection. A machine has considerable ability to distort. It focuses on a single element in a total environment and can yield deceptive results. A recorder captures voices without facial expressions, gestures and other subtle details. Nor is a picture any more accurate. But the reliability argument really is irrelevant. Evidence obtained by illegal search or seizure is excluded not because of unreliability, but because of the values its exclusion protects.

As for the second argument, the Government's legitimate interest in detecting and preventing crime must be balanced against the individual's freedom from unjustified intrusions. That balance was struck by the draftsmen of the Fourth Amendment when they required advance authorization of searches and seizures by a magistrate upon a showing of probable cause.

Rarely articulated but frequently evinced hostility to the Exclusionary Rule underlies the third argument:

"The case presents some of the most vexing and pressing problems of our day: What are the constitutional limitations on governmental electronic intrusions into privacy? Do the Fourth and Fourteenth Amendments circumscribe warrantless electronic intrusions as effectively as they limit corporeal invasions of privacy? Are the protections of the Fourth and Fourteenth Amendments diluted if the person subjected to the warrantless electronic intrusion is suspected of a crime?" (Dissent of Hufstedler, J. in Holmes v. Burr, supra.)

The Dissenting Opinion in Holmes v. Burr, supra, went on to explain the impact of warrantless surveillance:

"The corrosive impact of warrantless participant monitoring on our sense of security and freedom of expression is every bit as insidious as electronic surveillance conducted without the consent of any of the parties involved. In terms of the individual's reluctance to speak freely, no qualitative difference exists between the danger posed by third party interception and the risk that his auditor has sanctioned a secret recording on their conversation ..."

The holding of Olmstead was finally overruled in Katz v. United States. There the Court explained:

"The Fourth Amendment protects people, not places."

Tucked into Olmstead was a passing reference to the theory that persons subjected to warrantless electronic interception volunteer their statements to the Government by their very act of talking to each other. This theory later emerged as the constructive consent and assumption of a risk fictions relied on in On Lee v. United States, supra, 343 U.S. at 753-54 and Lopez v. United States, supra, 373 U.S. at 439. In Lopez, the majority added the variation that a person talking face-to-face with a known government agent assumes the risk that the agent will be able to repeat the conversation either by total personal recall or by a corroborative recording which in its nature is more reliable than human recollection. The theme was replayed in a slightly different key by the plurality in United States v. White.

Using familiar jurisprudential tools, Holmes can be successfully distinguished from every Supreme Court Decision directly bearing on the case other than Katz. Thus, On Lee and Lopez not only are factually dissimilar but, more importantly, were based on trespassory concepts discredited by Silverman v. United States, 365 U.S. 505 (1961); Osborn v. United States, 385 U.S. 323; and Berger v. New York, 388 U.S. 41 and destroyed by Katz. Rathbun v. United States, 355 U.S. 107 (1957), dealt with governmental eavesdropping by extension telephone without electronic recording, and the Decision was confined to an interpretation of Section 605 of the 1934 Federal Communications Act (47 U.S.C. § 605). Schwartz v. Texas, 344 U.S. 199 (1952), involved facts similar to Rathbun, but the Decision was based on the pre-Mapp authority refusing to apply the exclusionary rule to State Courts. Schwartz was overturned by Lee v. Florida, 392 U.S. 378 (1968), a post-Mapp case, holding inadmissible under Section 605 telephone conversations overheard on a party line and recorded. Lewis v. United States, 385 U.S.

206 (1966) and Hoffa v. United States, 385 U.S. 293 (1966), like Holmes, concerned the use of confidants who were secretly governmental informers, but in neither case was electronic surveillance employed. The facts in White were closer to those in On Lee than to Olmstead or Holmes. But of much greater significance, White necessarily applied pre-Katz law because the electronic surveillance of White occurred before Katz was decided, and Katz had been earlier held nonretoractive in Desist v. United States, 395 U.S. 244 (1969). United States v. White, is nevertheless important because it reveals continuing reliance by some of the Justices on the assumption of the risk doctrine. [See, United States v. White, at 754 (White, J.).]

Although the holding in White was based upon the nonretroactivity of Katz, several of the Justices did express views on the effect of Katz on participant electronic surveillance. Mr. Justice White, writing for the Chief Justice and Justices Stewart and Blackman, suggest that On Lee remained sound law. Justices Brennan, Douglas, Harland and Marshall each wrote separate Opinions arguing that the result in On Lee could not survive Katz. Mr. Justice Black, concurring in the Judgment of the Court, did not address this issue, merely reasserting the position taken in his Katz dissent that electronic surveillance was not within the ambit of the Fourth Amendment.

Proponents of the assumption of the risk doctrine, apparently recognizing the significant intrusion upon an individual's privacy caused by participant monitoring, do not say that everyone must anticipate and risk warrantless surveillance; rather, they limit its application to those who contemplate illegal activity. But never do these proponents explain how, absent the Fourth Amendment requirement of antecedent justification before a

neutral magistrate, the sinful can be separated from the saintly without probing everyone or leaving the selection to the unbridled discretion of government agents.

Adoption of the assumption of the risk theory ultimately rests on the cynical conclusion that a warrantless search is justified by what it reveals.

In the conclusion of her Dissenting Opinion, Judge Hufstedler, in Holmes v. Burr, supra, sets forth cogent argument indicating how destroying a right protected by the Fourth Amendment because of distaste for the remedy, ultimately destroys the Fourth Amendment itself. In 14 Cr. L. 2063, the Dissent explained:

> "Dissatisfaction with the exclusionary rule as the predominate remedy for conduct violating the Fourth Amendment is understandable and defensible. Attacks on the constitutional right of privacy as the means of expressing dissatisfaction with the remedy are intellectually indefensible and dangerous. A constitutional right continuously diluted becomes no right. Destroying a right protected by the Fourth Amendment because of distate for the remedy makes little more sense than destroying a patient for failure to respond to chosen medication. If the remedy is wrong, it is time to reexamine the remedy, not to diminish the right."

In Gelbard v. United States, 408 U.S. 41, 92 S. Ct. 2357, the Supreme Court held that the use of illegal electronic interceptions are proper defenses under certain circumstances. See, also, United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820.

C O N C L U S I O N

Petitioner respectfully prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

GILBERT S. ROSENTHAL
Attorney for the Petitioner

DATED: New York, New York
December 29th, 1981.

APPENDIX

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1039-42 September Term, 1980

Argued: March 12, 1981 Decided: September 4, 1981

Docket Nos. 80-1431, -1434

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- v. -

PETER ANGELILLI, WILLIAM BUTLER,
DONALD IRISH, and DONALD RIBOTSKY,

Defendants-Appellants

Before: FRIENDLY, MANSFIELD, and KEARSE, Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Eastern District of New York, after a trial before Jacob Mishler, Judge, and a jury, for violations of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C §§ 1962(c) and (d), extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and use of the mails to defraud in viola-

tion of 18 U.S.C. § 1341.

Convictions of appellants Butler, Irish, and Ribotsky affirmed. Conviction of appellant Angelilli affirmed as to violations of 18 U.S.C. §§ 1962(c), 1962(d), and 1951; judgment remanded for correction to reflect acquittal as to 18 U.S.C. § 1341.

RONALD G. RUSSO, Special Assistant United States Attorney, Brooklyn, New York (Edward R. Korman, United States Attorney for the Eastern District of New York, of counsel), for Plaintiff-Appellee.

GILBERT S. ROSENTHAL, New York, New York, for Defendant-Appellant Angelilli.

CHARLES HAYDON, New York, New York for Defendant-Appellant Butler.

WILLIAM SONENSHINE, Brooklyn, New York, for Defendant-Appellant Irish.

IRVING ANOLIK, New York, New York, for Defendant-Appellant Ribotsky.

KEARSE, Circuit Judge:

Defendants Peter Angelilli, William Butler, Donald Irish, and Donald Ribotsky appeal from judgments of conviction entered after a jury trial in the United States District Court for the Eastern District of New York, Jacob Mishler, Judge. The trial and convictions related to acts of defend-

ants as Marshals of the Civil Court of the City of New York, in conducting fraudulent auctions of the property of judgment debtors in that court. All defendants were convicted of engaging in a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. § 1962(c) (1976), of conspiring to violate Rico, in violation of 18 U.S.C. § 1962(d) (1976), and of extortion under "color of official right" in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976). In addition, Butler, Irish, and Ribotsky were convicted of using the mails to further a scheme to defraud in violation of the mail fraud statute, 18 U.S.C. § 1341 (1976); Angelilli was acquitted on the mail fraud charge, although the judgment as to him mistakenly states that he was convicted on this charge as well. Each defendant was sentenced to concurrent periods of incarceration of one year and one day on each count. Execution of the sentences has been stayed pending this appeal.

For the reasons below, we affirm the convictions.

FACTS

Defendants were four of the approximately eighty New York City marshals appointed by the Mayor of the City of New York as officers of the City's Civil Court, who are empowered, inter alia, to enforce judgments issued by that court. As part of the enforcement function, each marshal, upon request of a Civil Court judgment creditor, may levy upon and sell at publicly advertised auctions the property of a Civil Court judgment debtor.[1/] The auctions are conducted either by the marshal himself or by an auctioneer hired by the marshal.

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After a sale the marshal is entitled to deduct certain statutorily authorized fees[2] and must remit the remainder of the proceeds, up to the amount of the judgment, to the attorney for the judgment creditor; any proceeds in excess of the judgment debt and statutory fees are to be remitted to the judgment debtor.

In 1976 an investigation was begun into the bona fides of the marshals' auction sales. New York City Department of Investigation Detective Edward Gruskin assumed an undercover identity and began attending auction sales as a cash buyer. The investigation culminated in a 25-count indictment in 1978 against eleven marshals, including the four appellants, and two auctioneers for various violations of federal law on account of sales of debtors' property at artificially deflated prices. Seven of the marshals and both auctioneers pleaded guilty to certain offenses,[3] leaving only Angelilli, Butler, Irish, and Ribotsky to be tried. Each of the four defendants was charged in four counts: (1) participating in the affairs of the Civil Court through a pattern of racketeering (RICO § 1962(c); (2) conspiring to so participate (RICO § 1962(d); (3) extortion under color of official right; and (4) mail fraud. The indictment alleged that the pattern of racketeering activity included multiple acts of extortion and mail fraud; as the case went to the jury the indictment alleged with specificity ten extortionate transactions and five fraudulent mailings by Angelilli, eight extortionate transactions and four fraudulent mailings by Butler, nine extortionate transactions and four fraudulent mailings by Irish, and four extortionate transactions and three fraudulent mailings by Ribotsky. The conspiracy count charged a conspiracy among the four defendants, nine named but

unindicted coconspirators, and certain unnamed coconspirators; pretrial disclosure by the government revealed the names of twenty-nine persons in the last category.

A. The Prosecution's Evidence

Since only limited attacks are made on the sufficiency of the evidence produced at the five-week, 57-witness trial, a summary will suffice here. The prosecution's evidence consisted principally of the testimony of one of the former marshals who had been indicted and had pleaded guilty to a misdemeanor, the testimony of Detective Gruskin, together with certain tape recordings made by him of conversations at various auctions, and the testimony of about a dozen buyers, several of whom had also been auctioneers for various marshals including one or more of the defendants and all of whom were alleged to have been coconspirators. The witnesses presented the following picture.

Two groups of persons were aligned in the auction frauds: the marshals, acting either directly or through their auctioneers, and a group of 20 - 30 buyers, known by those who frequented the marshals' sales as "the boys." "The boys," who regularly attended the sales, were also referred to by the marshals as "the 40 thieves." Usually one or more of "the boys" would meet prior to the auction with the marshal who had advertised the auction; they would agree at that time on a deflated price at which the property would ostensibly be sold, and on an amount over the ostensibly sales price that "the boys" would pay to the marshal. The latter amount was known as "top money" or "money on top." Sometimes the amount of top money paid was greater than the amount paid at the sham auction.

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"The boys" acted in two ways to keep the bidding within the bounds agreed on with the marshals. First, they acted as a coordinated group at the auction to eliminate competitive bidding among themselves at that stage. This united action was called a "kipper." Second, "the boys" attempted in various ways to discourage outsiders from bidding on the property. These methods consisted principally of misrepresentations as to the existence of liens on the property to be auctioned. After a sham auction "the boys" would hold their own private auction, called a "knockout," at which the property might be sold for as much as twice the amount paid at the marshal's auction. The starting price in the knockout was the total of the sham auction price plus the top money, and the difference between this total and the final knockout price was distributed by the knockout winner to the rest of "the boys." The bids at the knockout often were made in terms of so many dollars per participant rather than in terms of a total price.

Following the marshal's auction, the marshal would send a check to the attorney for the judgment creditor, purporting to represent this price at which the property had been sold at the auction. Needless to say, the checks did not include the "top money" received by the marshal. Butler, Irish, and Ribotsky stipulated that, as to each of the alleged fraudulent mailings attributed to them in the indictment, the checks were sent through the United States mails to attorneys for judgment creditors who regularly did business in interstate commerce.

Detective Gruskin and each of the buyers and auctioneers who testified provided considerable detail as to auctions at which marshals demanded top

money. There was evidence as to thirty such transactions which were listed in the indictment was incidents of substantive violations of law; and there was testimony as to some sixteen other transactions, admitted as evidence of other overt acts in furtherance of the conspiracy.

In addition, there was evidence that the practice of demanding top money was pervasive among those marshals who engaged in property executions. All seven of the auctioneers who testified admitted that they had demanded and received top money on behalf of the marshals for whom they conducted auctions, who included not only the four defendants but many other alleged coconspirators. Manuel Ortiz, the former marshal who testified, also admitted having demanded top money. He and all of the buyers and auctioneers testified that it was the custom and practice among marshals at auctions to demand top money. Many of the buyers stated that they had learned about top money at the first marshal's sale they attended; some testified that they had heard about the practice long before, from their fathers who were auctioneers. Ortiz described the practice as a common topic of conversation among marshals on the occasions of their monthly Marshals' Association meetings or whenever they would get together. He testified that he had discussed the practice with many marshals, including the four defendants on many occasions, and that experienced marshals routinely "educated" newly appointed marshals on the practice.[4/] He himself had educated Butler, who had asked how to go about getting money on top.[5/]

B. The Defense Case

The Defendants called some three dozen witnesses to refute the charges against them. Butler testified in his own behalf, denying that he had ever ac-

cepted any "top money," and indeed denying that he had ever heard the term before the commencement of the trial. Irish tesitifed to the same effect, and added that he was hard of hearing. Angelilli did not testify, but called twelve witnesses who stated that they never noticed any unlawful goings-on, and that the prices paid at Angelilli's auctions were fair. Ribotsky (who also did not testify), Butler, and Irish called a total of twenty-one witnesses who testified to their respective good character.

C. The Verdicts

The jury was asked to return a general verdict as to each of the defendants on each count. In addition, as to each specific transaction or mailing alleged under the racketeering, extortion, and mail fraud counts, the jury was asked to state specifically whether or not it was proved beyond a reasonable doubt.

The jury found Butler, Irish, and Ribotsky guilty on all four counts. It found Angelilli guilty on the two RICO counts and the extortion count, but acquitted him of the mail fraud count. With respect to the individual transactions alleged, the jury found as follows: as to Angelilli, six out of the ten alleged extortionate transactions were proved, and none of the five alleged mail fraud transactions was proved; as to Butler, six of the eight alleged extortionate transactions and all four alleged mail frauds were proved; as to Irish all nine alleged extortionate transaction and all four alleged mail frauds were proved; and as to Ribotsky, three of the four alleged extortionate transactions and all three alleged mail frauds were proved.

DISCUSSION

On appeal defendants make numerous challenges to their convictions. Chief among these are the contentions (1) that the RICO statute does not apply to the activities of officials of the New York City Civil Court, (2) that their activities had insufficient impact on interstate commerce to trigger application of RICO or the Hobbs Act, (3) that their uses of the mails were not for the purpose of defrauding within the meaning of the mail fraud statute, and (4) that the admission of evidence as to the custom and practice of City marshals to demand top money was error.6/ We find no merit in the first three contentions. As to the fourth we conclude, on the basis of the record as a whole, that any error regarding the admission of the challenged testimony was not prejudicial.

A. The Civil Court as a RICO Enterprise

RICO § 1962(c) provides as follows:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c). "Enterprise," as used in § 1962(c) is defined as follows:

> 'enterprise' includes any individual, partnership, corporation, association,

> or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . .

18 U.S.C. § 1961(4). The enterprise in whose activities defendants are alleged to have participated through a pattern of racketeering,[7] is the New York City Civil Court. Defendants contend that governmental units such as the Civil Court are not enterprises within the meaning of RICO.[8] We disagree.

We begin with the language of the statute. On its face, the definition of "enterprise" is quite broad. We see no sign of an intention by Congress to exclude governmental units from its scope, cf. United States v. Turkette, 49 U.S.L.W. 4743 (U.S. June 17, 1981) (construing "enterprise" to include illegal as well as legitimate ventures), and we note three pertinent aspects of the definition that suggest an expansive rather than a restrictive thrust. First, the term "enterprise" is defined to "include[]" the entities listed thereafter. The use of the word "includes," rather than a more restrictive term such as "means," "indicates that the list is not exhaustive but merely illustrative." United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); United States v. Thevis, 474 F. Supp. 134, 138 (N.D. Ga. 1979). See also 2A C. Sands, Sutherland on Statutes and Statutory Construction 82 (4th ed. 1973) ("A term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning by construction than where the definition declares what a term 'means.'") Second, the use of the word "any" indicates an intent to make the list all-inclusive. The inclusion of "any individual," "Any . . . partnership," "any . . . corporation," and so forth, belies an intention to distinguish,

for example, between individuals having differing statuses, or between general and limited partnerships, or between business and municipal corporations. Finally, the word "entity" itself is hardly restrictive. It denotes anything that exists. As modified by the word "legal," it suggest that any being whose existence is recognized by law is within the term "enterprise." We conclude that on its face the definition of an enterprise to "include[] any . . . legal entity" is unambiguously broad, and that it does not exclude the Civil Court.9/

This conclusion is bolstered by certain of RICO's substantive goals, which appear to be directed particularly toward governmental entities. For example, "racketeering activity" is defined in § 1961(1) to include bribery, obstruction of justice, and obstruction of State or local law enforcement. The administration of justice and the enforcement of the law are obviously governmental functions, and brivery is "a crime which is peculiar to public officials, including judges." United States v. Vignola, 464 F. Supp. 1091, 1096 n.12 (E.D. Pa.), aff'd, 605 F.2d 1199 (3d Cir. 1979) (table), cert. denied, 444 U.S. 1072 (1980). Section 1961(1) also includes reference to the Hobbs Act, 18 U.S.C. § 1951, which prohibits extortion "under color of official right." Extortion under color of law is a crime which "can only be committed in the context of governmental activity." United States v. Sisk, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1979):

> At common law and under most statutes, bribery is limited to a payment given in exchange for the exercise of governmental power. Extortion under color of law is the use of governmental power to

> force an involuntary payment from another. By making bribery and extortion RICO offenses, Congress must be said to have understood that these offenses would be committed by governmental officials as a part of their work. Since these offenses can only be committed in the context of the work of a governmental agency, Congress must be taken to have intended that a governmental agency could be one of the types of "enterprises," the affairs of which are conducted through a pattern of racketeering offenses. The connection between the named offenses of bribery and extortion and governmental work is too close to say that government work is not one of the kinds of activity that may constitute a RICO "enterprise."

Id.

Our interpretation of the language of the statute to extend to activities affecting governmental entities is further supported by the purpose and legislative history of the Organized Crime Control Act of 1970 (the "Act"), Pub. L. No. 91-452, 84 Stat. 922, of which RICO is Title IX. The overriding purpose of the Act, as reflected in Congress's Statement of Findings and Purpose, was to deal with a widespread problem--the infiltration of organized crime into all areas of American life. While Congress was concerned principally with the relationship of crime to legitimate businesses, it does not appear that it intended to exlude the public sector from its assessment of the problem or its search for a cure:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democractic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and

> remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

84 Stat. 922-23 (emphasis added). Congress's concern about the infiltration of local governmental units had surfaced repeatedly in the debates on portions of the Act other than the RICO title. See comments in the Senate, e.g.: "More important, these criminals have, in some localities, established corrupt alliances within the processes of our democratic society: with the police, prosecutors, courts, and legislatures." 116 Cong. Rec. 586 (remarks of Sen. McClellan); "East of the Mississippi, particularly, it is the rare big-city government that is completely free of the fix." 116 Cong. Rec. 596 (reprinting Time Magazine cover story of August 22, 1969); "Corrupt officials and bribed law enforcement officers operate as 'a silent conspiracy' in support of organized crime. The syndicate could not continue to operate without corrupt judges and prosecutors, or without the assistance of a handful of bribed police." 116 Cong. Rec. 601 (remarks of Sen. Hruska); see also Senate Judiciary Committee Report's discussion of Title VIII of the Act, the provisions aimed at syndicated gambling: "Finally, Congress finds that corruption and bribery of State and local officials responsible for enforcement of criminal law facili-

tate illegal gambling enterprises." S. Rep. No. 617, 91st Cong., 1st Sess. 73 (1969). Similar views were aired in the House of Representatives, e.g.: the Act "places in the hands of the prosecution a number of necessary weapons in order to deal with the sophisticated operations of organized crime--including its connections with many public officials." 116 Cong. Rec. 35203 (remarks of Rep. McClory); "organized crime teaches the lesson that the law is for sale and that the road to success is to follow the path of corruption." 116 Cong. Rec. 35216 (remarks of Rep. McDade). Although the congressional discussion devoted expressly to Title IV did not state that governmental entities were to be the beneficiaries of RICO's substantive provisions, neither was there any statement that those entities were to be excepted. And of the three titles of the Act that create substantive offenses, RICO manifestly has the greatest substantive scope, and hence the greatest potential for dealing with corruption: the other two titles deal solely with illegal gambling activities (Title VIII), and with the importation, distribution, and storage of explosive devices (Title XI).

In sum, we view the language of § 1961(4), defining enterprise, as unambiguously encompassing governmental units, and we consider that the purpose and history of the Act and the substance of RICO's provisions demonstrate a clear congressional intent that RICO be interpreted to apply to activities that corrupt public or governmental entities. We note that this view is shared by virtually every other court that has considered the question. See, e.g., United States v. Altomare, 625 F.2d 5, 7-8 (4th Cir. 1980) (county prosecutor's office); United States v. Karas, 624 F.2d 500, 504 (4th Cir. 1980), cert. denied, 101 S. Ct. 857 (1981) (county law enforcement officials);

United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980) (County Attorney); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (county sheriff's department); United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980) (police department); United States v. Frumento, 563 F.2d 1083, 1089-92 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978) (Pennsylvania Bureau of Cigarette and Beverage Taxes); United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978) (police department); United States v. Sisk, supra, 476 F. Supp. at 1062 (state governor's office); United States v. Salvitti, 451 F. Supp. 195, 199 (E.D.Pa), aff'd, 588 F.2d 824 (3d Cir. 1978) (table) (Redevelopment Authority of the City of Philadelphia); United States v. Vignola, supra, 464 F. Supp. at 1095-98 (Philadelphia Traffic Court).[10/]

We find no merit in defendants' argument that the introduction in RICO of civil remedies as divestiture and forfeiture of the defendant's interests in an enterprise compel the conclusion that governmental entities are not enterprises within the meaning of RICO. The fact that a convicted official will have no forfeitable property interest in a governmental unit does not suggest that that unit cannot be a RICO enterprise. As the Supreme Court stated recently in United States v. Turkette, supra, in rejecting a similar challenge to the inclusion of unlawful activities as RICO enterprises,

> [e]ven if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept. Congress has provided civil remedies for use when

> the circumstances so warrant. It is untenable to argue that their existence limits the scope of the criminal provisions.

49 U.S.L.W. at 4745 (footnote omitted). To the extent that the remedy of forfeiture might be invoked to remove a defendant from his official position, we do not see its application as impermissibly altering sensitive federal-state relationships, by "displac[ing] the States' freedom to structure integral operations in areas of traditional governmental functions." National League of Cities v. Usery, 426 U.S. 833, 852 (1976). "In most instances, the issue would be moot since convicted felons are usually removed from office automatically." Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes, 69 J. of Crim. Law & Criminology 1, 13 n. 108 (1978).

Nor do we find persuasive the argument that if the term "enterprise" is broad enough to include the New York Civil Court it would also be broad enough to include a federal court or other federal agencies, and that such a result could not have been intended in view of the many provisions in the Criminal Code dealing with corruption of federal officials. The existence of other provisions is not a persuasive argument for construing "enterprise" so narrowly. RICO was not intended to supplant these provisions. Section 904(b) of Title IX, 84 Stat. 947, provides that

> [n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title.

RICO contemplates an overlap with other provisions of the Criminal Code. An essential element of a RICO violation is the commission of two or more predicate acts, all of which are crimes under state or federal law, 18 U.S.C. § 1961(1), and a defendant may be punished separately for the RICO violation and the predicate crimes. E.g., United States v. Boylan, 620 F.2d 359, 361 (2d Cir.), cert. denied, 101 S. Ct. 103 (1980). The Act expressly sought to establish new penal prohibitions, and to provide enhanced sanctions and new remedies. 84 Stat. 923. And RICO was intended to augment other provisions of the criminal law, and not to limit or be limited by them. See United States v. Barton, No. 80-1096, slip op. 2149, 2171-76 (2d Cir. March 27, 1981).

B. Hobbs Act Jurisdiction

The Hobbs Act provides that it is unlawful to "affect[] commerce . . . by . . . extortion." 18 U.S.C. § 1951(a). Extortion is defined in pertinent part as "the obtaining of property from another, with his consent, induced . . . under color of official right." 18 U.S.C. § 1951(b)(2). Each defendant was alleged to have affected commerce by obtaining "top money" from "the boys" under color of official right. Defendants contend that the government failed to prove that the taking of top money affected commerce. Angelilli argues in addition that there was no proof that any of the four "boys" from whom he was proved to have received top money was engaged in commerce. To the contrary, we find adequate evidence to support a conclusion that commerce was affected.

The jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. See United States

v. Gambino, 566 F.2d 414, 418 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978). Even a potential or subtle effect on commerce will suffice. See United States v. Augello, 451 F.2d 1167, 1170 (2d Cir. 1971), 1971), cert. denied, 405 U.S. 1070 (1972); United States v. Tropiano, 418 F.2d 1069, 1076-77 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970). In Calder, for example, we found the requisite impact on interstate commerce in the extortion of $300 per week from a restaurant that had no liquor license, but that purchased de-alcoholized wine from a Canadian company.

In the present case there was ample evidence that many of "the boys" did business in interstate commerce. They purchased goods from out-of-state buyers and resold in New York; they purchased in New York, advertised in the New York Times (which the district court took judicial notice is circulated outside of New York), and sold to buyers from outside the state.

As for Angelilli's individual contention, we note that one of the four persons who purchased from his testified that he sometimes sold to out-of-state buyers the merchandise he had bought at marshals' auctions. And in any event, since "the boys" acted as a unit in purchasing at the collusive price at the marshals' auctions, a marshal's sale to one of "the boys" who himself happened not to engage in interstate transaction would nevertheless have the required effect on interstate commerce since he was "kippered" with those who dealt interstate. The evidence of effect on commerce was sufficient as to all defendants to sustain the Hobbs Act convictions.

C. Mail Fraud

The mail fraud statute provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (emphasis added). The government charged that defendants violated the mail fraud statute when, after rigging the auction prices of the judgment debtors' property and taking their "top money," they mailed to the judgment creditors' attorneys checks representing the proceeds of the sales, "falsely and fraudulently claiming that the

remitted proceeds represented the amount received at the respective sales when in fact they had received additional 'money on top,' which fact was concealed from the judgment creditors." Butler, Irish, and Ribotsky, who stipulated that they mailed certain checks to attorneys who represented judgment creditors, were convicted of mail fraud.[11/] They attack their convictions by arguing that because they had already received their top money before the checks were mailed, their mailings were, as a matter of law, not for the purpose of executing the schemes to defraud. This contention cannot be sustained.

The evidence at trial revealed two respects in which the jury could have found that in fact the mailings were for the purpose of executing the fraudulent schemes. First, the mailings themselves were fraudulent. They represented to judgment debtor and creditor that the property levied on had been sold at a certain price; in fact the collusion between the marshal and "the boys" had resulted in a fraudulently low price, and even the immediate out of pocket cost to the buyers was not revealed, because the "top money" was not reflected in the mailings. In addition, the transmitting of checks representing the proceeds of the sale was a necessary step in executing the schemes because it was designed to lull the debtors and creditors into believing that the defendants had duly sold the property at auction. Had no checks been sent, or had the truth been revealed as to the amount for which the property was sold, the schemes would have failed.

Under the pertinent authorities, it is clear that the defendants' mailings were within the purview of the mail fraud statute. See United States v. Sampson, 371 U.S. 75, 80 (1962); United States v. Pereira, 347 U.S. 1 (1954). In Sampson, the de-

fendants represented that they could help businessmen either to seel their businesses or to obtain loans. Defendants' salesmen received fees from the victims which they converted to cashiers' checks and mailed to the defendants' regional offices, which in turn mailed form acceptance letters to the victims. The district court dismissed the indictment on the theory that the fraud was complete when the victims paid the fees. The Supreme Court reversed, holding that the

> defendants' scheme contemplated from the start the commission of fraudulent activities which were to be and actually were carried out both before and after the money was obtained from the victims. The indictment specifically alleged that the signed copies of the accepted applications and the covering letters were mailed by the defendants to the victims for the purpose of lulling them by assurances that the promised services would be performed. We cannot hold that such a deliberate and planned use of the United States mails by defendants engaged in a nationwide, fraudulent scheme in pursuance of a previously formulated plan could not, if established by evidence, be found by a jury under proper instructions to be "for the purpose of executing" a scheme within the meaning of the mail fraud statute.

371 U.S. at 80-81. See also United States v. Ashdown, 509 F.2d 793, 800 (5th Cir.), cert. denied, 423 U.S. 829 (1975) (mailing of stock certificates and confirmations of stock purchases are sufficiently connected to scheme to constitute mail fraud:

"post-purchase mailings which are designed to lull the victim into a false sense of security, postpone inquiries or complaints, or make the transaction less supsect are mailings in furtherance of the scheme."); United States v. MacClain, 501 F.2d 1006, 1011-12 (10th Cir. 1974). Such "lulling" mailings are essential to the fraudulent schemes in cases like Sampson and the present one, where the frauds are "not isolated and unrelated swindles," Bliss v. United States, 354 F.2d 456, 458 (8th Cir.), cert. denied, 384 U.S. 963 (1966) (defendant mailed a few initial payments to victim-investors while simultaneously seeking other victims), and where "the scheme continues and repeats over an extended period of time." United States v. Boyd, 606 F.2d 792, 794 (8th Cir. 1979) (mails used as part of continuing scheme to obtain federal grants from which defendant took kickbacks).

Defendants' reliance on the Supreme Court's decisions in United States v. Maze, 414 U.S. 395 (1974); Parr v. United States, 363 U.S. 370 (1960); and United States v. Kann, 323 U.S. 88 (1944), is misplaced. In each of those cases, the fraud was complete prior to the mailing, in that the defendant had already received all of the purloined property or services and had no further communication with the defrauded party. In Kann, for example, the fraud alleged involved diversion of funds from one corporation to a dummy corporation; the scheme was completed when the phony checks were cashed, and the funds received, by the defendants. The alleged mailings were made by the check-cashing bank, to collect from the drawee bank. Although the defendants initiated this chain of events, the mailing was held entirely unnecessary to their scheme. In Maze, the defendant had charged food and lodging on a stolen credit card. The fact that the merchants later mailed a bill to a bank, which in

turn mailed a bill to the card's rightful owner for payment, was held incidental--and indeed counter-productive--to the scheme.

In the present case, given the defendants' own need to communicate with the victims of their fraud, and to make fraudulent representations in those communications, we conclude that the mailings were made for the purpose of executing a scheme within the meaning of the mail fraud statute.

D. Evidence of Custom and Practice

We turn finally to the defendants' challenge to the prosecution's evidence that the demand and acceptance of top money was a regular custom and practice of the New York City marshals.[12] The defendants contend that the admission of such evidence was error and was highly prejudicial to them. For the reasons that follow, we find no basis for reversal.

The government elicited testimony from no fewer than 13 witnesses--all of the buyers, all of the auctioneers, and former marshal Ortiz--that it was the custom and practice of marshals to demand, either directly or through their auctioneers, money on top. The rationale on which this evidence was offered and received is not wholly unobscured. When the prosecutor posed the first custom and practice questions early in the trial, the district court allowed the testimony as "background," instructing the jury at that time that "it does not bind any defendant. This is just background as to what happens if you believe his testimony in the cases where there are fraudulently conducted sales." (Tr. 241.) Despite mention of a different rationale shortly thereafter in the absence of the jury,[13] the court several days later in effect reiterated its first instruction dur-

ing the custom and practice testimony of another buyer: "this is not direct evidence against any defendant, except as the witness indicates that a particular accused participated in it." (Tr. 1094.) Toward the end of the government's presentation of this type of evidence, however, the court informed the jury as follows: "I am admitting evidence on custom and practice because you may from the custom and practice and all the other evidence infer that the defendants engaged in the general custom and practice . . . ." (Tr. 2060-61.)

Nevertheless, by the time the jury was to be charged at the close of the evidence and summations, the district court had revised its view of the proper role of the custom and practice evidence: it instructed the jury that custom and practice evidence could be used only for the limited purpose of assessing whether the government had proven the existence of a conspiracy as charged in Count I of the indictment. The court instructed the jury that neither the custom and practice testimony, nor the evidence of top money demands other than those specifically alleged in the indictment against the four defendants could be used to prove that the defendants committed any of the substantive crimes charged:

> Now, there was evidence of sales that were not charged in the indictment. Evidence came before you on the custom and practice among marshals in conducting sales, just generally among what was called the business of selling judgment-debtor assets. The evidence of sales that were not charged in the indictment may only be used in determining whether the government established the existence of the conspiracy

> charged and for no other purpose. The evidence of custom and practice in the conduct of marshals' sales may be considered in determining whether the conspiracy charged was established. It is limited to such use and it may not be considered in determining whether the accused committed the other crimes charged in the indictment.

(Tr. 4847.) The substance of this instruction was repeated in response to the jury's request, shortly after it retired to deliberate, for clarification of "what constitutes conspiracy." The clarification included the following:

> You can take into consideration all the statements made by all the alleged conspirators to determine whether the government proved such a conspiracy. You can take into consideration proof of custom and practice, and as I said, that evidence is solely on the issue as to whether there was such a conspiracy.

(Tr. 4907.)

Defendants argue that the admission of the custom and practice evidence was barred by Fed. R. Evid. 404(b) because that evidence referred to other acts and was designed to show that the defendants acted similarly. We agree with the district court's final analysis that the custom and practice testimony was admissible for a limited purpose. Such testimony could properly be considered in determining whether or not the government had proven the existence of a broad conspiracy among marshals to demand top money, as alleged in the indictment, but it could not be considered in

reaching a finding as to whether or not any of the defendants themselves demanded or received top money. The key to both conclusions is the scope of Rule 404(b).

Rule 404(b) provides as follows:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

To the extent that the evidence related to acts other than those charged, it was admissible under the second sentence of Rule 404(b) to show a continuous plan. Insofar as the evidence, on the other hand, reflected a custom and practice that was part of the alleged conspiracy itself, it was not inadmissible under the first sentence of the Rule because the conduct did not represent other acts. See, e.g., United States v. Carroll, 510 F.2d 507, 509 (2d Cir. 1975), cert. denied, 426 U.S. 923 (1976); 22 C. Wright & K. Graham, Federal Practice and Procedure § 5239 (1978):

> In cases where the incident offered is part of the conspiracy alleged in the indictment, the evidence is admissible under Rule 404(b) because it is not an "other" crime. The evidence is offered as direct evidence of the fact in issue, not as circum-

> stantial evidence requiring an inference as to the character of the accused.

Id. at 450 (footnote omitted).

Since the acts were part of the conspiracy, evidence of their occurrence was admissible to prove the conspiracy, regardless of whether they were performed by the defendants or by other co-conspirators. See, e.g., United States v. Araujo, 539 F.2d 287, 289 (2d Cir.), cert. denied, 429 U.S. 983 (1976); United States v. Papadakis, 510 F.2d 287, 294-95 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Costello, 352 F.2d 848, 854 (2d Cir. 1965), rev'd on other grounds, 390 U.S. 39 (1968); United States v. Bates, 600 F.2d 505 (5th Cir. 1979); United States v. Vega-Limon, 548 F.2d 1390 (9th Cir. 1977); 22 C. Wright & K. Graham, supra, § 5239, at 451. In Papadakis, for example, we approved the receipt of evidence, to prove the existence of the conspiracy, that on several occasions not charged in the indictment the defendant and other conducted themselves in a manner similar to that charged. And in Costello, we stated that

> the acts of others not involving the defendant directly may come in against him merely to show the existence of a conspiracy, with which he is to be linked by quite separate proof.

352 F.2d at 854. Even acts prior to the first act alleged in the indictment may be proven to show the continuing nature of the conspiracy. Id.

We see no error in the district court's receipt of evidence as to some of the conspiratorial acts in a somewhat generalized form. For example, rather

than detailing each of the top money demands they had made or witnessed as auctioneers and/or buyers over the years, the witnesses generally testified as to how many marshals' auctions they had attended in those capacities, and estimated in what percentage of those cases top money had been demanded. It was within the district court's discretion, after assuring itself that such evidence was based on personal knowledge, see Fed. R. Evid. 403, 602; see United States v. Brown, 548 F.2d 1194, 1198 n. 13 (5th Cir. 1977), to permit the testimony to be given in that form. Likewise we find no error in the court's permitting these experienced witnesses[14] to draw expert inferences as to the existence of a custom and practice among marshals to demand top money. Their opinions were properly admitted under Fed. R. Evid. 702[15] to assist the jury in determining whether there was a broad-scale agreement among marshals to demand top money.

While we conclude that the custom and practice evidence was admissible for the purposes we have discussed, we agree with the defendants that Rule 404(b) barred its use to prove that the individual defendants acted in conformity with the custom and practice. The district court ultimately agreed with this view, as evidenced in his final and supplemental charges to the jury. But, as noted earlier, during the testimony of one buyer, the court had instructed the jury that it was permitted to infer from the custom and practice evidence that the defendants individually had engaged in the custom and practice. To the extent that the custom and practice evidence consisted of testimony as to a defendant's other acts, the interim instruction--which made no mention of plan, or knowledge, or any other use of the evidence permissible under the second sentence of Rule 404(b), but instead expressly permitted the inference that the defendant had acted

as charged in the indictment--was contrary to the prohibition of the first sentence of Rule 404(b). The use of the other act evidence would require an inference that the other act show the defendant's propensity to perform acts of that type, and a further inference, from that propensity, that the defendant therefore performed the act charged. See 22 C. Wright & K. Graham, supra, § 5239, at 460-61. Such a chain of inferences, even if the person who performed the other acts is the person whose conduct is in issue, is logically so weak that the relevance of the factual evidence will nearly always be outweighed by the probable prejudice resulting from its admission. The logical weakness is the reason for the general prohibition of Rule 404(b):

> The basic reason for the inadmissibility of evidence of other crimes, wrongs, or acts is that such evidence is irrelevant to prove the conduct in question. As Wigmore says, it "has long been accepted in our law . . . [t]hat 'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' . . . ." The reason for this is that our knowledge of the causes of human conduct is too weak to provide any major premise that will support the desired inference . . . .
>
> The only explanatory model for human conduct expressly recognized by the law of evidence is the concept of "character." But our confidence in this construct is so weak that its explicit use is only authorized under special circumstances.

22 C. Wright & K. Graham, supra, § 5239, at 436 (footnotes omitted).

Moreover, to the extent that the chain of reasoning requires an inference that the individual defendants committed certain acts based on evidence that other acts were performed by other persons, it is even more tenuous. In giving the interim instruction permitting such an inference, the court apparently relied on Fed. R. Evid. 406, which provides as follows:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in confirmity with the habit or routine practice.

We do not believe that this Rule authorized the interim instruction. We begin by noting that the challenged evidence concerned the custom and practice of marshals as a group rather than the "habits" of individual defendants. While various witnesses testified that one or more of the defendants had, on specific occasions, demanded and been paid top money, none testified that it was the habit of such defendant to do so. Thus, the interim instruction permitted the jury to infer conduct of an individual on the basis of the custom of an organization. It may be that the ambiguous structure of Rule 406--which does not link the conduct of a person expressly with proof as to the habit of that person, nor the conduct of an organization expressly with proof as to the routine practice of that organization, see 23 C. Wright & K. Graham, Federal Practice and Pro-

cedure § 5273, at 42 (1980)-- was intended to make admissible the evidence of the practice of the organization to prove the conduct of any of its members. As a matter of policy, however, we cannot countenance that application of the Rule here, see 23 C. Wright & K. Graham, supra, § 5275, at 56, since it would defy the principle of the individuality of guilt to hold that a defendnat's mere membership in an organization practicing a particular type of crime could be used to show that the defendant himself committed such a crime. We conclude that the district court's interim instruction, which allowed the jury to use the custom and practice evidence to infer that the defendants demanded top money, was incorrect.

The conclusion that there was error, however, does not end the inquiry, for the Judicial Code instructs us that an incorrect ruling does not require the reversal of a judgment if the error was "harmless":

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

28 U.S.C. § 2111 (1976). The leading criminal case construing the predecessor of § 2111 is Kotteakos v. United States, 328 U.S. 750 (1946), and its standards remain authoritative under the present provision. United States v. Frank, 494 F.2d 145, 161 n.19 (2d Cir.), cert. denied, 419 U.S. 828 (1974). In Kotteakos, the Supreme Court pointed out that in evaluating whether an error was harmless an appellate court

is not to determine guilt or innocence, nor to speculate upon probable reconviction. 328 U.S. at 763. Rather, it is to determine, "in relation to all else that happened,"

> what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of the other men, not on one's own, in the total setting.

Id. at 764.

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Id. at 764-65 (footnote and citations omitted).

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After a review of the record as a whole we are convinced, for several reasons, that the district court's erroneous interim instruction did not influence the jury in the slightest. First, the court's final charge gave the jury the correct instruction and gave it in clear, concise, and unambiguous terms: the jury could consider custom and practice only in determining whether the existence of a conspiracy had been proved, not in considering any other alleged crime. Second, the jury did not appear to hark back to the interim instruction, which had been given more than two weeks before the final charge; it never requested reiteration of that earlier instruction; and when it asked for clarification of the court's final charge on conspiracy, it neither singled out the custom and practice portion for particular review, nor appeared to question the court's repeated admonition as to the limited role of that evidence.

Most importantly, contrary to defendants' contention that "the fate of the individual defendants at bar was sealed" by the receipt of the custom and practice evidence, it is clear that the jury did not indiscriminately find the defendants guilty. As to Angelilli, it found four of the ten alleged extortionate transactions not proved and found all five of the alleged mail fraud transactions not proved. As to Butler, it found two of the eight alleged extortionate transactions not proved. And as to Ribotsky, it found one of the four alleged extortionate transactions not proved. The jury's concentration on individual transactions was evident not only from its ultimate conclusions, but also from the nature of its numerous requests for taped and documentary evidence and for the rereading of certain testimony during its deliberations. In every instance the request related to evidence of specific auctions held or attended by one of the

defendants. In no instance did the jury make any request that appeared to be concerned with custom and practice evidence.

Finally, we note that in only one rereading of testimony requested by the jury was there any mention of the custom and practice of demanding top money. This evidence related to a transaction in which the buyer testified that he had paid top money but that he could not recall whether he had handed the money to Butler or to his auctioneer. When asked why he had paid top money, he answered, "Practice and custom I think was the word used here just a few minutes ago." On this single occasion, then, some custom and practice testimony was reread to the jury. This, however, was one of the transactions that the jury found not proved.

In all the circumstances we are left with the certain conviction that the erroneous instruction had no effect, and that the custom and practice evidence was not misused.

CONCLUSION

The convictions of all defendants are affirmed. The judgment as to Angelilli is remanded for correction to reflect his acquittal of the mail fraud charge under 18 U.S.C. § 1341.

FOOTNOTES

1/ The marshals' duties also include executing commerical and residential evictions and sending out collection letters on unsatisfied judgments. There was testimony at trial that some marshals concentrated in these areas and did not execute on property.

2/ Marshals are paid neither salary nor expenses. Their lawful compensation comes solely from fees as allowed by statute, deducted from the proceeds of the sales of debtors' property.

3/ In addition, five auctioneers who were not named in the indictment but were amont those later identified by the government as unnamed coconspirators pleaded guilty to charges relating to these activities; and one similarly identified auctioneer was convicted, following a jury trial, of obstructing justice by giving false and evasive answers to the grand jury investigating these activities. See United States v. Kanovsky, 618 F.2d 229 (2d Cir. 1980).

4/ Ortiz testified in part as follows:

> Q Was there a custom and practice in the industry during the years you were a Marshal, namely, from '71 to '78 of a Marshal being paid money on top?
>
> A Yes, sir.
>
> Q And did you personally engage in that conduct?
>
> A Yes.
>
> Q And can you tell us how often you did that, sir?
>
> A For the past three and a half years as a Marshal, I used to conduct sales on a weekly basis, but they would show up every two weeks at my sales.
>
> Q When you say they --
>
> A The 40 thieves.
>
> Q And on those occasions, did you take money on top?
>
> A Yes.
>
> Q Now, did there come a time, sir, that you had conversations with any other Marshal

with respect to that practice of taking money on top?

A Yes, I did.

Q And can you tell us, sir, who the other Marshals were that discussed this custom and practice with you?

A You could start out with Pete, Bill, Don.

Q Would you identify them by full names? When you say Pete, who do you mean?

MR. ROSENTHAL: Identification conceded.

A With Bulter, Don Irish and Don Ribotsky.

Q And you discussed that practice with these individuals?

A Yes, once in a while.

Q Who else did you discuss it with at--

A Lester Kasper, George Rivera, various other Marshals.

THE COURT: Where would you discuss these matters?

THE WITNESS: At--we used to hold a meeting of the Marshal's [sic] Association at least once a month and downstairs in the lounge, we'd get together before the meeting and talk about things that went on.

(Tr. 2142-43.)

Q Did there come a time that you did have a conversation with Mr. Ribotsky about this practice?

A Yes.

* * *

Q On that occasion, sir, what did Mr. Ribotsky say to you and what did you say in return?

A He asked me to use Robert Rappaport as an auctioneer for my sales.

Q Did he indicate why he was using him?

A I would get a better break from him [sic] with respect to top money.

Q Did he indicate whether he was using Mr. Rappaport at that time?

A I believe he was.

Q When you [s]ay you'd get a better break with respect to top money, was anything further said by Marshal Ribotsky at that time?

A I don't recall.

Q At this time you were a new marshal, is that correct?

A Yes.

Q Did you have similar conversations with marshals other than Mr. Ribotsky and Mr. Kasper?

A Yes.

Q Who did you have those conversations with?

A I had them with--with respect to using auctioneers?

Q Yes.

A With Peter Angellili [sic], Don, and Bill Butler and Karic.

Q Any other marshal that you spoke to, sir?

A Rivera Ponte, all the marshals that handle executions.

Q Do you recall at the time you had the conversation with Mr. Butler what was said?

A With Mr. Butler?

Q Yes.

A Well, Mr. Butler took over my office so I had to go over all the procedures with him.

Q When you say procedures, did you go over the regulations?

A Over the regulations and how the operation of the office was to take place.

Q Did you have any conversation with him about using an auctioneer?

A Yes.

Q Can you tell us what you said to him and he said to you?

A At that time I told him to use Walter Jacobson, that he would get a fair shake.

Q Did you explain to Mr. Butler the purpose of using the auctioneer?

A Yes. You use the auctioneer to put a buffer between you and any ensuing investigation that comes up because the auctionner [sic] is the one that deals with these buyers.

(Tr. 2146-48.)

Q During the time frame you were a marshal can you describe the custom and practice that was engaged in with respect to money on top?

What happens at sales?

A You would advertise the [s]sale, and the buyers would show up, they would come in and they would look at the merchandise and if they liked it they would come over to you and sometimes they would tell you what they would give you and how much top money they'd give you.

If they didn't like it they'd say, all you have is crap over here and we'll give you so much, take it or leave it.

Sometimes if we knew the merchandise was pretty good we'd approach them and say we w[an]t so much for this and then we'd sell it, the hammer would come down at that particular price.

Q At a pre-agreed price?
A Yes.
Q Were there occasions where the auctioneer handled the entire deal for you?
A Yes.
Q On those occasions did you have anything to do with the men you referred to as the 40 theives [sic]?
A All I had to do w[i]th them is convey my prices to the auctioneer and maybe he would go outside and give it to them.
Q And was it the custom and practice that the auctioneer would return to the marshal and explain as to whether it had been agreed to?
A Yes, agreed or disagreed.
Q And following the agreement then the auction would be conducted?
A Yes.
Q You as a marshal would be advised what the deal was?
A Yes.
Q And you ultimately approved the sale going forward?
A Yes.

(Tr. 2149-50.)

5/ Q I believe you told us you got to know Marshal Butler for the first time in 1974 or '75?
A Yes.
Q Is that right?
A 1974.
Q Let us start with 1974.
A Okay.
Q All right.
What is the first time at a marshals' meeting that you recall discussing top money

in the presence of or with Marshal Butler?
A The first time?
Q Yes.
A Exact date?
Q No. Approximate date will do. Some time in what, '74, was it?
A '74 or '75 when I discussed it with Marshal Butler.
Q That was discussed at a Marshal's [sic] meeting; is that right?
A That's correct.
Q And you said to him, you know there is such a thing as top money; is that right? Is that what you said?
A No. It was common knowledge with all the Marshals, that this was going on.
Q Well, what was discussed if that was common knowledge?
A He wanted to know how you went about it.
Q Marshal Butler sometime in '74 or '75 asked you how you go about dealing in top money; is that right?
A That's right.

(Tr. 2216-18.)

6/ We have examined all of defendants' contentions and find them unpersuasive. The contention that the recitation in the indictment of several acts of extortion or several acts of mail fraud in a single count was impermissible duplicitous, was waived, United States v. Viserto, 596 F.2d 531, 538 (2d Cir.), cert. denied, 444 U.S. 841 (1979), and is in any event lacking in merit since no prejudice has been shown, see United States v. Murray, 618 F.2d 892, 896-97 (2d Cir. 1980). Ribotsky's contention that a cassette recording of a particular transaction was played for the jury during its deliberations

although the cassette had not been admitted into evidence may be technically correct, but any error was clearly harmless. The recording played for the jury was a copy of a tape that had been admitted into evidence, the transcript of which had also been admitted into evidence; Ribotsky has pointed to no significant differences between the admitted tape and the cassette copy. Finally, given the many witnesses who testified to Ribotsky's receipt of top money, Ribotsky's arguments that he was merely a peripheral defendant whose case should have been severed, and that there was insufficient evidence to convict him, are frivolous.

7/ A "pattern of racketeering activity" consists of at least two predicate acts within a ten-year period. 18 U.S.C. § 1961(5). Predicate acts include any act or threat of murder, kidnapping, gambling, arson, robbery, birbery, extortion, or narcotics dealing, which is punishable under state law by imprisonment for more than one year, and include any of a large number of violations of federal statutes including the Hobbs Act and the mail fraud statute.

8/ Defendants argue also that RICO does not apply because the activities of the Civil Court, which is an instrumentality of the City of New York, lack the requisite impact on interstate commerce. Under § 1962(c) the activities of the enterprise need only "affect" interstate commerce, and even a slight effect will suffice. See, e.g., United States v. Barton, No. 80-1096, slip op. 2149, 2166 (2d Cir. March 27, 1981), and cases cited therein; United States v. Mannino, 635 F.2d 110 (2d Cir. 1980). In the present case this requirement is easily satisfied by the fact, stipulated by all defendants, that "individuals and corpora-

tions who regularly engage in interstate commerce, appear as litigants in the Civil Court of the City of New York."

9/ We find no merit in defendants' argument that because RICO contains a definition of "State," 18 U.S.C. § 1961(2), the definition of "enterprise" excludes states and their instrumentalities because it does not specifically refer to states. The conclusion does not follow from the premise. If one definition is broad enough to overlap part of another, specific reference is pro tanto unnecessary. There obviously is some overlap among the definitions, and no effort to cross-reference. For example, "person" is defined to "include[] any individual or entity capable of holding a legal or beneficial interest in property," 18 U.S.C. § 1961 (3); the definition of enterprise refers to individuals and entities, although not to persons.

10/ The only contrary decision of which we are aware is United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976) ("Mandel"), aff'd on other grounds en banc by an equally divided court, 602 F.2d 653 (4th Cir. 1979), in which the district court dismissed a count of an indictment on the ground that a state could not be a RICO enterprise. The government did not appeal the dismissal of that count. Subsequently, however, in United States v. Baker, supra, the Fourth Circuit specifically rejected the view of the District Court in Mandel. The district court's decision in Mandel was relied on in the dissenting opinion in United States v. Grzywacz, supra, which contended that a police department could not be a RICO enterprise. The defendants here rely on the latter opinion and Mandel in arguing that the principle of ejusdem generis requires an interpretation of "enterprise" that excludes governmental bodies. They argue that since the

phrase "or other legal entity" is preceded by "individual, partnership, corporation, [or] association," the term "legal entity" must be deemed limited to one of "the common legal forms in which business entities and labor groups fashion themselves to carry out their private function." United States v. Grzywacz, supra, 603 F.2d at 691 (dissenting opinion), quoting Mandel, supra, 415 F. Supp. at 1021. We find this argument unpersuasive since we believe the congressional intent appears clearly to the contrary. "The rule of ejusdem generis is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." United States v. Turkette, supra, 49 U.S.L.W. at 4744. It is

> a useful tool of construction restorted to in ascertaining legislative intent. The rule should not be employed when the intention of the legislature is otherwise evident . . . . Nor should it be applied to defeat the obvious purpose of the statute or to narrow the targets of Congressional concern.

United States v. Frumento, supra, 563 F.2d at 1090.

For a similar reason we reject defendants' argument that the "principle of lenity" requires an interpretation that excludes governmental entities. The principle of lenity, like ejusdem generis, applies only where the statute is ambiguous. United States v. Turkette, supra:

> There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play . . . ("The canon in favor of strict con-

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> a useful tool of construction resorted to in ascertaining legislative intent. The rule should not be employed when the intention of the legislature is otherwise evident . . . . Nor should it be applied to defeat the obvious purpose of the statute or to narrow the targets of Congressional concern.

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> There being no ambiguity in the RICO provisions at issue here, the rule of lenity does not come into play . . . ("The canon in favor of strict con-

> struction [of criminal statutes] . . . is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.")

49 U.S.L.W. at 4746 n.10 (citations omitted).

11/ While Angelilli stipulated that the checks drawn by him and listed in the indictment represented money realized from his auction sales and were made payable to attorneys for judgment creditors, he refused to stipulate to having used the mails. The government sought to prove at trial that Angelilli had mailed these checks, but the jury acquitted him of this charge.

12/ Testimony was elicited with respect to certain other customs and practices as well, including the related custom and practice of "the boys" to discourage outsiders, and certain ministerial customs relating to the signing of the bill of sale after an auction. The custom and practice with which we deal on this appeal is that of the marshals' demanding money on top.

13/ On the following day, the court appeared to rule, in the absence of the jury, that this custom and practice testimony was admissible to show the marshals' awareness of wrongdoing:

> The reason I am permitting custom and practice in the trade is because if the Government can show that there was a custom and practice in the trade, and that the custom and practice involved fraudulent auction sales, because they were involved in the trade, the jury from that may infer that they are aware of what they were doing and the specific acts--

(Tr. 412.) The government argues on appeal that the evidence was admissible with respect to the state of mind of the buyers, an issue for Hobbs Act purposes. Several of the buyers testified in effect that paying top money was the only way to do business at marhsals' auctions because the practice was so widespread; if they did not ante up they could not buy in the future from this marshal, and to buy in the future from other marshals would require payment of top money to the latter. See, e.g., United States v. Kennedy, 291 F.2d 457 (2d Cir, 1961). Although this rationale has some merit it does not appear to have been articulated clearly during the trial, and it does not appear that the jury was ever instructed that it could consider the custom and practice testimony for this purpose. Indeed, the court's closing charge was to the contrary. See infra.

14/ The experience of the witnesses ranged from that of buyer Barry Stampler, who has attended 250-300 marshals' auctions over a two-year period, to that of Nathan Weisser who had been an auctioneer for twenty-eight years.

15/ Rule 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The court charged the jury that the testimony as to custom and practice was opinion testimony:

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Witnesses, as I indicated, were called to the stand. They testify only to what the witness saw or heard. There is an exception to that general rule. Witnesses who by reason of education and experience have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for that opinion.

For example, Dr. Ober was called to testify on Mr. Irish's hearing problems. Some witnesses testified that they were familiar with the custom and practice among marshals who were charged with the duty and who performed the duty of selling judgment debtors' assets. Because of their experience they could express an opinion as to custom and practice. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves. You don't have to accept an expert's opinion at face value. The credibility of the opinions or the testimony of experts is judged like the testimony of any other witnesses.

(Tr. 4811.)

APPENDIX B

CONCURRING OPINION AT COURT OF APPEALS

Friendly, Circuit Judge, concurring in the result:

I am unable to agree with the portion of Judge Kearse's excellent opinion that holds the New York Civil Court to be an "enterprise" within the meaning of 18 U.S.C. § 1962(b). No one would think of describing a court as an "enterprise" as a matter of ordinary English speech. Black's Law Dictionary, 5th Ed. defines enterprise as: "A venture or undertaking especially one involving financial commitment." The only pertinent definition in the Random House Dictionary of the English Language is "a company organized for commerical purposes; business firm." Definitions in other dictionaries I have consulted are even less pertinent. The problem here is totally different from that in United States v. Turkette, 49 L.W. 4743 (1981), where the Supreme Court criticized the First Circuit for reading the word "legitimate" into Congress' definition of "enterprise". The issue in Turkette was whether there was any justification for excluding from the term "enterprise" an association that would normally be deemed to come within it. The question here is whether there is any justification for expanding the term to include something that would normally be deemed to fall outside it. Conceivably the group of marshals who engaged in the sordid activities described by the majority could be deemed an "enterprise". But that was not what the indictment charged or what the jury was told it must find in order to convict. It is of no consequence, as the majority urges, that obstruction of law enforcement is included in the definition of "racketeering activity" in § 1961(1). As the Court said in Turkette, supra, 49 L.W. at 4745:

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> The "enterprise" is not "the pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all time remains a separate element which must be proved by the Government.

For these reasons, as well as other expressed by Judge Swygert dissenting in United States v. Graywacz, 603 F.2d 682, 690 (7d Cir. 1979), cert. denied, 446 U.S. 935 (1980), I would vacate the convictions under RICO, 18 U.S.C. § 1962(c) and (d), but would allow those under the Hobbs Act, 18 U.S.C. § 1951, and the mail fraud statute, 18 U.S.C. § 1341, to stand.

I must also express concern over so much of the discussion of F.R.E. 404(b), as relates to participation of the defendants in similar transactions which were not a part of the conspiracy.[1/] I could not at all agree that proof that one of the defendants had performed other acts of the precise nature of those here charged during much the same time frame would be "logically so weak that the relevance of the factual evidence will nearly always be outweighed by the probably prejudice resulting from its admission." Opinion, pp. 26-27. The crimes here charged were sufficiently unusual that such evidence would have been highly relevant as proof of design or system under Rule 404(b), see 2 Wigmore, Evidence, § 304 at 249 (Chadbourn rev. 1979)--"such a concurrence of common features that the various acts are natually to be explained as caused by a general plan of which they are the individual manifestations." McCormick also approved the use of evidence of other crimes by the accused "so nearly identical in method as to earmark them

as the handiwork of the accused"--a device "so unusual and distinctive as to be like a signature", Evidence, § 190 at 449 and cases cited (Cleary ed. 1972). Judge Weinstein's Treatise on the Federal Rules of Evidence agrees that Rule 404(b) permits proof of prior crimes by the accused "when details of the crime show an individuality that, if repeated, are highly probative of the conclusion that they were committed by the same person." 2 Evidence ¶ 404.16 at 404-92-93 and cases cited in notes 21 and 22 (1980). Indeed, the Wright & Graham treatise cited by the majority seems to acquiesce in this view. See 22 Wright & Graham, Federal Practice and Procedure, § 5244 at 501 (1978). While it would have been appropriate for the judge to explain the limited basis for which the evidence was admitted, he was not bound to do so, at least in the absence of a request. See 2 Weinstein, supra, ¶ 404.19 at 404-117-119.

FOOTNOTE

1/ As to acts which were a part of the conspiracy, I agree that Rule 404(b) has no application since these would not be "other crimes". Since it is not at all clear that the evidence of custom and practice did include any act of defendants that were not a part of the conspiracy, this portion of the opinion may well be unnecessary dictum.

APPENDIX C

ORDER DENYING RECONSIDERATION

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifth day of November, one thousand nine hundred and eighty-one.

----------x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PETER ANGELILLI, WILLIAM BUTLER, DONALD IRISH and DONALD RIBOTSKY,

Defendants-Appellants.

Nos. 80-1431
80-1432
80-1433
80-1434

----------x

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Peter Angelilli, William Butler, Donald Irish and Donald Ribotsky,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petitions for rehearing are DENIED.

Order Denying Reconsideration

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro
A. Daniel Fusaro
Clerk

/s/ by Francis X. Gindhart
Chief Deputy Clerk

APPENDIX D

PRE-TRIAL MEMORANDUM OF DECISION
DATED JANUARY 22nd, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

79 CR 562

Plaintiff,

-against-

Memorandum of
Decision

PETER ANGELILLI,
WILLIAM BUTLER,
DONALD IRISH,
WALTER JACOBSEN,
EDWARD KARIC,
LESTER KASPER,
SHERWOOD LOUIS,
ANGELO ORTIZ,
MONTARY QUIDLEY,
S. ROBERT RAPPAPORT,
DONALD RIBOTSKY,
EUGENE WEISBROD and
ERWIN YOUNG,

January 22, 1980

Defendants.

----------x

A P P E A R A N C E S :

Pre-Trial Memorandum of Decision
Dated January 22nd, 1980

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Ronald G. Russo, Assistant
U. S. Attorney, Of Counsel

GILBERT S. ROSENTHAL, ESQ.
Attorney for Peter Angelilli
401 Broadway
New York, New York 10013

CHARLES HAYDON, ESQ.
Attorney for William Butler
67 Wall Street
New York, New York 10005

WILLIAM SONENSHINE, ESQ.
Attorney for Donald Irish
186 Joralemon Street
Brooklyn, New York 11201

ALBERT FELIX, ESQ.
Attorney for Walter Jacobsen
11 Boradway
New York, New York 10004

RONALD P. FISCHETTI, ESQ.
Attorney for Edward Karic
1290 Avenue of the Americas
New York, New York 10019

JOHN D. PATTEN, ESQ.
Attorney for Lester Kasper
111 Broadway
New York, New York 10006

Pre-Trial Memorandum of Decision
Dated January 22nd, 1980

DANIEL MARKEWICH, ESQ.
Attorney for Sherwood Lewis
350 Fifth Avenue
New York, New York 10001

RAYMOND F. NARROL
Attorney for Angelo Ortiz
15 Park Row
New York, New York

JAY L. T. BREAKSTONE, ESQ.
Attorney for Montary Quidley
233 Broadway
New York, New York 10007

STANLEY V. TELLERMAN, ESQ.
Attorney for S. Robert Rappaport
225 Broadway
New York, New York 10007

IRVING ANOLIK, ESQ.
Attorney for Donald Ribotsky
225 Broadway
New York, New York 10007

IRVING P. SEIDMAN, ESQ.
Attorney for Eugene Weisbrod
485 Lexington Avenue
New York, New York

PAUL VICTOR, ESQ.
Attorney for Erwin Young
67 Wall Street
New York, New York 10005

MISHLER, CH. J.

Pre-Trial Memorandum of Decision
Dated January 22nd, 1980

Introduction

Thirteen individuals have moved to dismiss a twenty-five count indictment charging them with a variety of substantive and conspiratorial offenses arising out of an alleged scheme to "fix" public auction sales which were conducted on levies on assets of judgment-debtors to satisfy judgments entered in the Civil Court of the City of New York. For the reasons which follow, we reject nearly all of the defendants' contentions. However, we do entertain serious doubts as to the sufficiency of counts 16 through 25 which charge violations of 18 U.S.C. § 1341. In addition, we question whether the indictment properly joins defendants and offenses and believe that severances under Fed.R. Crim.P. 14 may be warranted. However, since these issues have not been fully briefed or argued, decision will be reserved until after the parties have presented their respective views.

The Indictment

Eleven of the thirteen individuals named in the indictment were at all pertinent times New York City Marshals, appointed by the Mayor of the City of New York pursuant to Article 16 of the New York City Civil Court Act,/1 and, as officers of that Court, "empowered to levy upon the property of judgment-debtors and to schedule and conduct public auction sales of said property to satisfy judgments issued by th[at] Court . . . . "/2 Indictment, p.2, ¶3. The remaining two defendants were auctioneers, licensed by the Department of Consumer Affairs of the City of New York, who sold property at the public auctions scheduled by the Marshals.

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Dated January 22nd, 1980

The indictment contains an "introduction" in which it is alleged generally that certain marshals and auctioneers partook in a scheme to conduct the auction sales in an "unlawful, collusive and corrupt manner in contravention of the laws of the United States." P.2, ¶6(a). The essence of the scheme as described in the introduction was an agreement by marshals and auctioneers "to sell the property of judgment-debtors to certain buyers at pre-arranged and artificially deflated prices in return for cash and property to which they were not entitled, known in the trade as 'money on top,' thereby defrauding judgment-creditors of the true value of their judgments and judgment-debtors of the true value of their property." P.3, ¶6(b). The introduction further alleges that the participants in the scheme did receive "top money," did conduct the sham auctions, and did forward through the mails the proceeds of the sales to attorneys for judgment-creditors.

The indictment then recites the following specific charges:

Count 1. All the defendants are charged with conspiring to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) in violation of 18 U.S.C. § 1962(d). Specifically, it is alleged that they conspired to violate 18 U.S.C. § 1962(c), which provides, in pertinent part, that

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activites of which affect interstate or foreign commerce, to conduct or participate directly or indirectly, in the conduct of such enterprise's af-

fairs through a pattern of racketeering activity . . . .

In support of this charge, the indictment alleges: (1) that the Civil Court of the City of New York is an "enterprise" within the meaning of RICO, 18 U.S.C. § 1961(4); (2) that this enterprise affected interstate commerce; (3) that the defendants were "employed by or associated with" this "enterprise;" and (4) that they participated in its activities through a "pattern of racketeering activity," as that term is defined in 18 U.S.C. § 1961(1), i.e., by the commission of multiple violations of the Hobbs Act, 18 U.S.C. § 1951, and the mail fraud statute, 18 U.S.C. § 1341.[3] The factual basis for the claimed violations of these latter two sections will be discussed below.

Count 2. All of the defendants are charged together with violating or aiding and abetting substantive violations of 18 U.S.C. § 1962(c). The basic theory of this charge is the same as that which underlies the conspiracy charged in Count 1.

Counts 3 through 15. Each of these counts charges a different defendant with those individual violations of 18 U.S.C. § 1951 that together constituted one of the "patterns of racketeering activity" critical to the RICO charges. In support of this charge it is alleged, in explanatory paragraphs preceding the enumeration of the counts, that each defendant affected commerce by demanding and receiving money to which he was not entitled from buyers at auction sales "upon an understanding that the goods of judgment-debtors . . . would be sold at artificially deflated prices"--the "top money" referred to above--and that each induced the buyers' consent to these payments "by fear and

under color of official right."/4 Each of these counts, except number 15 which charges defendant Ortiz, itemizes the various alleged payments by giving the name of the payor, the amount paid, and the date of the transaction.

Counts 16 through 25. In these counts, 10 of the defendant marshals/5 are charged individually with those separate violations of 18 U.S.C. § 1341 which together form the second "pattern of racketeering activity" referred to above./6 In support of this charge it is alleged inter alia, that the defendants' conduct in relation to the auctions constituted a "scheme and artifice to defraud," and that as "part of the said scheme . . . the defendants would defraud the judgment-creditor in that, having sold the property of the judgment-debtor at less than its true value, the defendants would mail the proceeds of said sale to the judgment-creditors, falsely and fraudulently claiming that the remitted proceeds represented the amount received at the respective sales when in fact they had received additional 'money on top,' which fact was concealed from the judgment-creditors;" Indictment, p. 27 ¶1(d). The individual counts then itemize the alleged mailings by each defendant, listing their dates and addresses involved.

THE DEFENDANTS' MOTIONS

The defendants move to dismiss counts 1 and 2 of the indictment primarily/7 on the following grounds:

(1) that the Civil Court is not an "enterprise" within the meaning of 18 U.S.C. § 1961(4);

(2) that the defendants are not "employed by or associated with" the Court as required by 18 U.S.C. § 1962 (c);

(3) that the indictment fails to charge a "pattern of racketeering activity" in that allegations of multiple violations of 18 U.S.C. §§ 1951 and 1341 are insufficient as a matter of law.

The contention regarding the sufficiency of the charges under sections 1951 and 1341 which will be explained below, also form the basis of motions to dismiss the counts in the indictment which charge separate violations of those sections.

In addition, several of the defendants move to dismiss and/or sever the charges against them on the ground of misjoinder.

DISCUSSION

I. The Civil Court of the City of New York as an "Enterprise."

18 U.S.C. § 1961(4) provides that "[a]s used in [RICO]--'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

Defendants contend that the Civil Court, as a government entity, is excluded from the definition. In support of this claim they rely on numerous policy arguments, tenets of statutory construction, and references to RICO's legislative history. We find

little need to itemize these contentions or to deal with them at length. Suffice it to say, the identical arguments[8] have been previously carefully considered and rejected by nearly[9] every court in which they have been raised. See, e.g., United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979); United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), cert. denied sub nom. Millhouse v. United States, 434 U.S. 1072, 98 S. Ct. 1256 (1978); United States v. Brown, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904, 98 S. Ct. 1448 (1978). Indeed, in United States v. Vignola, 464 F.Supp. 1091 (E.D.Pa.) aff'd. without opinion, No. 79-1132 (3d Cir. Aug. 8, 1979), petition for cert. filed, 48 U.S.L.W. 3324 (U.S. Nov. 13, 1979), Chief Judge Lord ruled on the identical issue that is before us and held that the Philadelphia Traffic Court was an "enterprise" within the meaning of RICO:

> Most courts, in varying degrees, do have an effect upon the economy and upon interstate commerce; those who interpret and apply the law can indeed work major changes upon the economy. In trying to cleanse the American economy of the subversive influence of racketeering activity, there is no reason why Congress should have excluded the judiciary from its protective and remedial statutory scheme. The judiciary is as vulnerable to the evils of corruption as any other entity, public or private. We see no reason to read into RICO an exception for that branch of government, nor do we believe that Congress intended to create one.

464 F. Supp. at 1097.

The Second Circuit had yet to rule whether a governmental agency falls within the statutory definition of "enterprise." However, it has held that in view of the express congressional directive that the provisions of RICO "be liberally construed to effectuate its remedial purposes," Act § 904(a), [1970] U. S. Code Cong. & Admin. News at p. 1104, the term is to be given a broad interpretation. See United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039, 97 S. Ct. 736 (1977); United States v. Parness, 503 F.2d 430, 439 (2d Cir.), cert. denied, 419 U.S. 1105, 95 S. Ct. 775 (1974).[10] In light of this instruction, and the weight of the carefully reasoned authority in other Circuits, we hold that the Civil Court is an "enterprise" within the meaning of RICO.

II. The Defendants as "person[s] employed by or associated with" the Civil Court

By its terms, 18 U.S.C. § 1962(c) proscribes certain conduct by "any person employed by or associated with" the enterprise involved. Defendants contend that their relationship with the Civil Court does not fall within this definition. In support of this argument the defendant auctioneers posit that their conduct is not in any way regulated by the Civil Court and that, at most, they serve the purely ministerial function of conducting auctions on behalf of the marshals. Brief of defendant Rappaport, pps. 3-4. The defendant marshals, while conceding that the source of their power is Article 16 of the Civil Court Act, attempt to show that the relationship to that Court is tangential by pointing to the fact that they are not paid by

it or answerable to it for disciplinary purposes. Brief of defendant Karic, p.14. We reject these arguments.

The indictment alleges that the Civil Court Act empowered the defendants--directly in the case of the marshals and indirectly in the case of the auctioneers--to conduct auctions to satisfy judgments of that Court. We think that common sense indicates that it would require a most tortured interpretation of the phrase "associated with" to hold that these allegations were insufficient in this regard. In light of the requirement that we construe the statute broadly we decline, as did the Third Circuit in United States v. Forsythe, 560 F. 2d 1127 (3d Cir. 1977),[11] to interpret the phrase in a manner that would defeat the "legislative intent . . . to make RICO violations dependent on behavior not statute." Id. at 1136 (citing United States v. Mandel, 415 F. Supp. 997, 1018 (D. Md. 1976) aff'd, 602 F.2d 653 (4th Cir. 1979((en banc)).

II. The "Patterns of Racketeering Activity

As we noted at the outset, the indictment alleges that the "patterns of racketeering activity" underlying counts 1 and 2 are the defendants' repeated violations of 18 U.S.C. §§ 1951 and 1341. See 18 U.S.C. §§ 1961(1),(5). The defendants challenge the sufficiency of the charges under these sections.

A. 18 U.S.C. § 1951

The Hobbs Act, 18 U.S.C. § 1951(a), provides, in pertinent part:

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Dated January 22nd, 1980

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by . . . extortion or attempts or conspires so to do . . . shall be fined not more than $10,000 or imprisoned not more than twenty years or both.

18 U.S.C. § 1951(b)(2), in turn, defines, "extortion" as "the obtaining of property from another, with his consent, induced or wrongful use of actual or threatened force, violence, or fear, or under color of official right."

As we have previously stated, the indictment alleges that the defendants violated section 1951 by obtaining "top money' from buyers at auction sales "with their consent, said consent having been induced by fear and under color of official right." It is thus apparent that the indictment charges extortion in the very language of the statute. Nonetheless, the defendants claim that the charge is insufficient. First, they contend that "compulsion" is an element of extortion. Then, they argue that since the indictment's introduction alleges that certain buyers were in collusion with defendants in the conducting of the auctions, they could not have been "compelled" to pay "top money." Thus, they conclude, the defendants could not have "extorted" the "top money" from the buyers.

It would serve little purpose to analyze this argument at length in view of the number of appellate courts that have considered it. It is now clear that when dealing with charges of extortion "under color of official right," "any element of coercion that may be required to establish extor-

tion . . . is supplied by the misuse of the defendant's official power," United States v. Mazzei, 521 F.2d 639, 644 (3d Cir. 1973) (en banc), cert denied, 423 U.S. 1014, 96 S. Ct. 446 (1975), and that "[s]o long as the motivation for the payment focuses on the recipient's office the conduct falls within the ambit of 18 U.S.C. § 1951." United States v. Trotta, 525 F.2d 1096, 1100 (2d Cir. 1975), cert. denied, 421 U.S. 910, 95 S. Ct. 1561 (1975). See also United States v. Rabbitt, 583 F.2d 1014, 1027 (8th Cir. 1978). (Extortion "under color of official right," "includes the misuse of one's office to induce payments not due the person or his office."); United States v. Hathaway, 534 F.2d 386, 393 (1st Cir.), cert. denied, 429 U.S. 819, 97 S. Ct. 64 (1976).

Since the indictment is clearly based on the theory that the defendants received property from buyers as a result of their abuse of the marshals' office, the charges that they violated section 1951 are sufficient./12

B. 18 U.S.C. § 1341

The essential elements of an offense under 18 U.S.C. § 1341 are (1) a scheme to defraud, and (2) a mailing for the purpose of executing the scheme. /13 Pereira v. United States, 347 U.S. 1, 8, 74 S. Ct. 358, 362 (1954). Defendants claim that they cannot be prosecuted under this section because their conduct failed to satisfy the first element. Brief of Defendant Angelilli, pps. 18-21. In essence, this contention is based on the factual assertion that the auctions were conducted in a fair manner. The claim lacks substance. The indictment clearly alleges facts to support the allegation. The truth or falsity of the charge is a question

that a jury must decide.

We do, however, have serious misgivings as to whether the indictment adequately charges the second element. The case law is clear that where the mails are used after a fraudulent scheme has "reached fruition," "[i]t cannot be said that the mailings in question were for the purpose of executing the scheme as the statute requires." United States v. Maze, 414 U.S. 395, 400, 94 S. Ct. 645, 648-49 (1974) (quoting Kann v. United States, 323 U.S. 88, 94, 65 S. Ct. 148, 151 (1944)). See generally United States v. Tarnopol, 561 F.2d 466 (3d Cir. 1977); United States v. LaFerriere, 546 F.2d 182 (5th Cir. 1977); United States v. Staszcuk, 502 F. 2d 875 (7th Cir. 1974), modified on other grounds, 517 F.2d 53 (en banc), cert. denied, 423 U.S. 837, 96 S. Ct. 65 (1975). Our review of the indictment leads us to believe that it may charge a use of the mails "after the object of the scheme ha[d] been accomplished," and thus may not state a violation of section 1341. United States v. Tarnopol, supra, 561 F.2d at 472 (citing United States v. Maze, supra).

The sole relationship between the alleged scheme ane the mails that the indictment charges is that the proceeds of the fraudulently conducted auction sales were mailed by the marshals to the judgment-creditors. As has been noted, it is alleged that these judgment-creditors were defrauded since the proceeds were less than they would have been had the sales been conducted in a fair manner, one designed to bring a price representing the true value of the property. However, it is arguable that the judgment-creditors were defrauded--and the scheme's purpose fulfilled--when the judgment-debtors' property was sold under the alleged illegal scheme at artificially deflated prices.

On this assumption it would appear that the mailing of a check for the net proceeds of the sales to the attorney for the judgment-creditor was unrelated to the success of the scheme and would not bring the charged conduct within the proscription of section 1341. See United States v. Maze, supra, 414 U.S. at 404, 94 S. Ct. at 651 (Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the fraudulent scheme. But it did not do this; instead it required that the use of the mails be 'for the purpose of executing such scheme.'").

We recognize, however, that in this case the question of whether the "mailings were sufficiently closely related to [the] scheme to bring [the charged] conduct within the statute," United States v. Maze, supra, 414 U.S. at 399, 94 S. Ct. at 648, is a close one. It may be contended that the indictment can be read as charging that the scheme did, in fact, satisfy the requirement of "depend-[ing] in some way [on its] completion . . . or the prevention of its detection on the mailings in question." United States v. LaFerriere, 546 F.2d 182, 187 (5th Cir. 1977). Since the issue has not been addressed by counsel we believe that it would be appropriate to hear their argument prior to ruling on the matter. Accordingly, we reserve decision on the defendants' motion to dismiss counts 16 to 25 of the indictment.

III. Joinder

Several of the defendants have moved to dismiss and/or sever the government's case against them on the ground that the indictment does not comport with the provisions of Rule 8 regarding joinder of offenses and defendants./14 Most of

the defendants, however, with the court's permission, had reserved their right to make such motions until after disposition of the motions to dismiss on the substantive grounds which we have discussed herein. Similarly, the government was granted permission to respond to the motions attacking joinder at that time. Accordingly, we will not tarry long on this issue now. The following comments are appropriate, however.

Count 1 of the indictment charges all the defendants in a single conspiracy to violate 18 U.S. C. § 1962(c). The court's understanding of the government's theory, together with the information it obtained during the course of related proceedings, leads it to question whether the government can, in fact, prove such a single conspiracy. Rather, our understanding of the government's theory leads us to questions whether a single conspiracy can be sustained under the allegations of this indictment. The indictment indicates that each marshal favored a particular auctioneer and buyers--thus pointing to a charge of multiple conspiracies. In our view, if this in fact is the proof the government will offer, the danger of spill-over prejudice will be so great as to warrant severances. In other words, we do not believe that the mere fact that all the defendants were associated with the Civil Court would warrant their being tried together for crimes they committed either independently or in smaller groups. See generally United States v. Cambindo, Nos. 78-1364, 78143848 (2d Cir. Oct. 12, 1979).

We would also note that as to all the counts in the indictment, even if joinder is technically correct under Rule 8, severances may nonetheless be appropriate. As the First Circuit has noted:

"Assessment of whether distinct offenses or defendants may be included in the same indictment involves a balancing of the benefit to the government in trying related incidents and individuals together against the prejudice to a defendant of possibly having multiple offenses and participants confused with each other." United States v. Luna, 585 F.2d 1, 4 (1st Cir. 1979). In this indictment, which charges thirteen defendants with wrongs committed at literally dozens of auction sales, the danger of prejudice is obvious.

Finally, we point out that our concern regarding prejudice is heightened by the Second Circuit's recent decision in United States v. Huber, 603 F.2d 387, 395-96 (2d Cir. 1979), in which the court recognized "that the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended." The court thus "cautioned against undue prosecutorial zeal in invoking RICO, and "emphasized to the district judges that when RICO is invoked each set of facts must be evaluated independently" to assure that the statute is not abused. We heed this directive.

We emphasize that we do not now rule on the question of joinder. We express these concerns sinply so that the parties may direct their arguments toward them.

DISPOSITION

A hearing on the motions to dismiss the counts charging violations of 18 U.S.C. § 1341 (16 through 25) and to dismiss for misjoinder of counts and/or defendants or alternatively to sever is set down for

Pre-Trial Memorandum of Decision
Dated January 22nd, 1980

February 1, 1980 at 3:00 p.m./15

/s/ JACOB MISHLER
U. S. D. J.

FOOTNOTES

/1 The marshals are appointed to 6 year terms. New York City Civil Court Act, § 1601.

/2 Section 1609 of the Civil Court Act provides that marshals shall have the same authority as sheriffs "in respect to the taking and restitution of property." Section 5233(a) of the N.Y.C. P.L.R., in turn, provides in pertinent part that

> [t]he interest of the judgment-debtor in property obtained by a sheriff pursuant to execution or order . . . shall be sold by the sheriff at public auction at such time and place and as a unit or in such lots, or combination thereof, as in his judgment will bring the highest price . . . .

The marshal may either conduct the auction personally or hire a licensed auctioneer to conduct it. See Weinstein, Korn and Miller, New York Civil Practice ¶ 5233.03.

/3 Paragraph 8 of count 1 alleges that "[i]n furtherance of said conspiracy and to effectuate the objects thereof, the OVERT ACTS set forth in Count Two, among others, were committed. Count 2, in turn, which charges a substantive violation of

18 U.S.C. § 1962(c), itemizes separate repeated violations of 18 U.S.C. §§ 1951 and 1341 to support the allegation of a "pattern of racketeering activity." These alleged violations are repeated and charged separately in counts 3 through 25.

/4 The counts also charge the defendants with attempting to commit the substantive violations and aiding and abetting their commission.

/5 Defendant Angelo Ortiz is not named in these counts.

/6 The defendants are charged both as having committed and aiding and abetting the commission of these substantive offenses.

/7 Defendants' contention that counts 1 and 2 should be dismissed because the indictment does not allege their involvement with "organized crime" does not merit discussion. See United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050, 96 S. Ct. 777 (1976); United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa.); aff'd without opinion, No. 79-1132 (3d Cir. Aug. 8, 1979), petition for cert. filed, 48 U.S. L.W. 3324 (U. S. Nov. 13, 1979). See also United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), cert. denied, 429 U.S. 1039, 97 S. Ct. 736 (1977). Nor do we find meritorious defendants' claims that the counts are insufficient since the Civil Court's activities do not "affect" interstate commerce within the meaning of 18 U.S.C. § 1962(c). The government is entitled to offer proof on the question. See United States v. Vignola, supra, 464 F. Supp. at 1097 & n. 18.

/7 Defendants also raise what appears to be the novel contention that to hold the Civil Court is an "enterprise" would be to sanction a federal interference with state sovereignty that is prohibited by the Tenth Amendment to the Constitution. While this argument has not been previously addressed, it has, of course, been implicitly rejected by those courts which have held that RICO may be applied to state governmental agencies. On the facts before us, we explicitly reject it. It will not do to say that if RICO can be applied here to the conduct of officers of the Civil Court, "then the Federal Government will be able . . . to regulate . . . the Court itself including its judges and the conditions under which they thereafter serve as judges." Brief of Defendant Irish, p. 15. The Tenth Amendment, as interpreted by the Supreme Court in National League of Cities v. Usery, 426 U.S. 833, 96 S. Ct. 2465 (1975), prohibits Congress from exercising its power under the Commerce Clause "so as to force directly upon the State its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." Id. at 855, 96 S. Ct. at 2476. The limitation, the Court emphasized, is on the federal power to direct authority against the "State as States," id. at 845, 96 S. Ct. at 2471, (emphasis added) because the Federal Government may not, under the principles of federalism, "displace the States' freedom to structure integral operations in areas of traditional governmental functions . . .," id. at 852, 96 S. Ct. at 2474. By applying RICO to the facts at hand, however, there is not consequent interference with the functioning of the Civil Court. The Federal Government is not, as in Usery, forcing the state to perform acts contrary to the latter's own legis-

lative judgment. Indeed, the indictment charges that the defendants acted contrary to the state's own laws. Moreover, RICO is not being directed at the state itself. Rather it is being directed at individuals who allegedly used a state apparatus unlawfully.

/9 It is true that in United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), the court held that the State of Maryland was not an "enterprise." However, the Fourth Circuit did not deal with the issue in its opinions in the Mandel case, see 591 F.2d 1347 (4th Cir. 1979); 602 F.2d 653 (4th Cir. 1979). In any event, the decision is clearly contrary to the weight of appellate authority. See United States v. Vignola, 464 F. Supp. at 1096 n. 17.

/10 In Huber, the Court held that a group of corporations could be an "enterprise," within the meaning of RICO; in Altese, it held that the term includes illegitimate as well as legitimate enterprises; and in Parness, it ruled that it includes both foreign and domestic enterprises.

/11 In Forsythe, the RICO charge grew out of allegations that "a bail bond agency . . . had been making systematic money payments to various magistrates, constables, minor . . . court employees and other law enforcement officials in return for the referral to the [a]gency of defendants who had been brought before the magistrates for the setting of bail." 560 F.2d at 1131. The Third Circuit held sufficient an indictment charging certain constables and magistrates with conducting the affairs of the agency through a pattern of racketeering activity, rejecting their claim that they were not "associated" with the enterprise and "that § 1962(c) covers

only those 'inside' the enterprise rather than outside.'" Id. at 1135.

/12 Defendants also contend that the section 1951 charge is insufficient because they did not "affect commerce" by their activities. For the present, it sufficies to say that the statutory requirement of "affect[ing] commerce" "in any way or degree," is met upon a showing of no more than a "minimal effect on interstate commerce," United States v. Harding, 563 F.2d 299, 301 (6th Cir. 1977), cert. denied, 434 U.S. 1062, 98 S. Ct. 1235 (1978), and may indeed be "satisfied by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce. United States v. Staszcuk, 517 F.2d 53 (7th Cir.) (en banc) (Stevens, J.), cert. denied, 423 U.S. 837, 96 S. Ct. 65 (1975). In the instant case, the indictment alleges an affect on interstate commerce. Whether that affect can be proved is a question whose answer must await trial. See United States v. Trotta, supra, 525 F.2d at 1098.

/13 18 U.S.C. § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other articule, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the

purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowlingly causes to be delivered by mail according to the direction thereon or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (Emphasis added.)

/14 Fed.R.Crim.P. 8 provides:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense it the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.

> Such defendant may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed.F. Crim.P. 14, provides in pertinent part, that

> "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

/15 At that time, the court will also hear argument on defendant Kasper's motion to dismiss the indictment on the ground that the government did not comply with Fed.R. Crim.P. 6(d).

APPENDIX E

PRE-TRIAL MEMORANDUM OF DECISION AND ORDER DATED FEBRUARY 19th, 1980

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

79 CR 562

Plaintiff,

-against-

Memorandum of Decision and Order

PETER ANGELILLI,
WILLIAM BUTLER,
DONALD IRISH,
WALTER JACOBSEN,
EDWARD KARIC,
LESTER KASPER,
SHERWOOD LOUIS,
ANGELO ORTIZ,
MONTARY QUIDLEY,
S. ROBERT RAPPAPORT,
DONALD RIBOTSKY,
EUGENE WEISBROD and
ERWIN YOUNG,

February 19, 1980

Defendants.

----------x

A P P E A R A N C E S :

Pre-Trial Memorandum of Decision
and Order Dated February 19th, 1980

HONORABLE EDWARD R. KORMAN
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York 11201
Ronald G. Russo, Assistant
U.S. Attorney, Of Counsel

GILBERT S. ROSENTHAL, ESQ.
Attorney for Peter Angelilli
401 Broadway
New York, New York 10013

CHARLES HAYDON, ESQ.
Attorney for William Butler
67 Wall Street
New York, New York 10005

WILLIAM SONENSHINE, ESQ.
Attorney for Donald Irish
186 Joralemon Street
Brooklyn, New York 11201

ALBERT FELIX, ESQ.
Attorney for Walter Jacobsen
11 Broadway
New York, New York 10004

RONALD P. FISCHETTI, ESQ.
Attorney for Edward Karic
1290 Avenue of the Americas
New York, New York 10019

JOHN D. PATTEN, ESQ.
Attorney for Lester Kasper
111 Broadway
New York, New York 10006

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DANIEL MARKEWICH, ESQ.
Attorney for Sherwood Louis
350 Fifth Avenue
New York, New York 10001

RAYMOND F. NARROL
Attorney for Angelo Ortiz
15 Park Row
New York, New York

JAY L. T. BREAKSTONE, ESQ.
Attorney for Montary Quidley
233 Broadway
New York, New York 10007

STANLEY V. TELLERMAN, ESQ.
Attorney for S. Robert Rappaport
225 Broadway
New York, New York 10007

IRVING ANOLIK, ESQ.
Attorney for Donald Ribotsky
225 Broadway
New York, New York 10007

IRVING P. SEIDMAN, ESQ.
Attorney for Eugene Weisbrod
485 Lexington Avenue
New York, New York

PAUL VICTOR, ESQ.
Attorney for Erwin Young
67 Wall Street
New York, New York 10005

MISHLER, CH. J.

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The government outlined its proof in response to the court's concern expressed in its Memorandum of Decision of January 22, 1980 concerning possible misjoinder of counts and/or defendants and the sufficiency of the mail fraud counts (16 through 25), 18 U.S.C. § 1341. The question of joinder turns on whether the indictment charges multiple conspiracies--as many as eleven./1 The government states its proof will show:

As identifiable group of bidders/2 regularly attended public auction sales conducted by defendant marshals or their designated auctioneers pursuant to executions issued out of the Civil Court of the City of New York. Not all of the members of the group attended any one sale; nor did the same members attend the sales conducted by a particular marshal. At times two marshals were present and conducted the sale or sales of the same debtor's assets as a result of multiple executions against the debtor. On occasion a marshal or auctioneer joined "the boys" (as the group of bidders was known among them) at the sale. The common practice accepted and followed by all the alleged co-conspirators/3 was for one or more of "the boys" who attended the same to agree with either the marshal or his designated auctioneer (acting for the marshal) to pay a bribe known as "top money," in consideration for the marshal conducting the sale in a manner that one of "the boys" would be the successful bidder at a price below that attainable at a fair competitive auction. The members of the conspiracy indulged in practices that discouraged "outsiders" from attending the sales and/or bidding at the sales.

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Discussion

The Second Circuit has not yet discussed the limits of a conspiracy to participate in the affairs of an enterprise through a pattern of racketeering activity. At least one other court, however, has indicated a belief that by enacting RICO, Congress effectuated a substantial change in the law of conspiracy, authorizing presecution under 18 U.S.C. § 1962(d) for "multi-faceted, diverse" conspiracies which could not be reached as single conspiracies under the general conspiracy statute, 18 U.S.C. § 371. United States v. Elliott, 571 F.2d 880, 900-905 (5th Cir.), cert denied, 439 U.S. 953 (1978). While we agree with the Elliott court that section 1962(d) does have a broader reach than section 371, we do have some doubt as to the applicability of that case's precise holding to the facts at bar./4 We need not decide that question, however, since we are of the view that the government's offer of proof supports its contention that the jury could find the existence of a single conspiracy under the more limited proscriptions of section 371.

We reach this conclusion by application of a few familiar principles that have developed consistently with that body of law whose cornerstone is Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946), and which holds that parties may not be convicted under an indictment charging a single conspiracy where the government's proof has established the existence of several conspiracies and the proof of acts committed by parties involved in one of those conspiracies has "spilled over" to substantially prejudice the rights of defendants who were uninvolved in that undertaking. See generally United States v. Cambindo, Nos. 78-1364-1438-48, slip. op. at 5100-5108 (2d Cir. Oct. 12, 1979).

The first of these principles is that "Kotteakos prohibits charging multiple unrelated conspiracies, but it does not prohibit charging one master conspiracy and establishing at trial that under the master conspiracy more than one subsidiary scheme was involved." United States v. Kenny, 462 F.2d 1205, 1216 (3rd Cir.), cert. denied, 409 U.S. 914, 93 S. Ct. 233 (1972) (citing Blumenthal v. United States, 332 U.S. 539, 68 S. Ct. 248 (1947)). Second, multiple groups may be tied to a single conspiracy where the proof shows that the groups have provided "mutual dependence and assistance" towards the success of "one general business venture." United States v. Tramunti, 513 F.2d 1087, 1106 (2d Cir.), cert. denied, 423 U.S. 832, 96 S. Ct. 54 (1975). Relatedly, at least where the charged conspiracy has a discrete objective, those who perform some acts in its furtherance need not know those who are performing other acts, where by the nature of the conspiracy itself an individual participant should realize that the scheme's success depends on the cooperation and aid of others. Blumenthal v. United States, supra. Lastly, it is clear that "there is no requirement that every defendant must participate in every transaction in order to find a single conspiracy." United States v. Perez, 489 F.2d 51, 62 (5th Cir. 1973).

These principles have repeatedly been applied by courts within the framework of the black letter law that "the gist of the [conspiracy] offense remains the agreement . . . ." United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964), cert. denied 379 U.S. 960, 85 S. Ct. 647 (1965). Thus, as the Fifth Circuit stated in United States v. Perez, supra:

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> In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objective of the conspiracy, then it is one conspiracy, . . . If that agreement contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, then such agreement constitutes a single conspiracy . . . . And the same is true as to an agreement that contemplates that the activity will be repeated sometimes with, sometimes not, the same actors.

Id. at 62 (citations omitted).

The facts of Perez are particularly instructive. There, twenty-one defendants were named in an indictment as "co-conspirators in a single common scheme to cause the mails to be used in furtherance of a scheme or artifice to defraud insurance companies through the staging of automobile collisions . . .," in violation of 18 U.S.C. §§ 371, 1341. The scheme was a complex one, involving, aside from its organizers, "recruiters" who recruited the drivers of the target automobiles, the drivers of the targets, "hitters," who were to drive their cars into the targets, lawyers who processed the false claims, and physicians who prepared false medical records. The fifteen defendants who were tried and convicted claimed that the government's proof showed multiple conspiracies, arguing that the staging of each accident involved several different individuals who were not involved or even aware of the planning of other accidents. The court rejected this contention, finding that the

evidence revealed "a single scheme which envisioned a series of staged collisions, rather than . . . a series of one shot efforts . . . ." Id. at 62. That the personnel may have changed from accident to accident was not critical. Rather, such changes were in fact an essential part of the overall scheme in that it helped avoid its detection. In summary, the court stated:

> [I]t would be "a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies rather than to call it a single one."
>
> . . .
>
> From an operational sense this was not a series of little concoctions to set up a particular collision. It was rather a grand scheme for all to obtain some reward for his/her participation each according to the part played and the risk undertaken.
>
> It was only confounds the law to try to characterize this in the figure of spokes, wheels, hubs, rims or chains . . . . It was one big, and hopefully profitable enterprise, which looked toward successful frequent but nonetheless discreet repetitions, and in which each participant was neither innocent nor unrewarded.

Id. at 63-64 (quoting United States v. Palermo, 410 F.2d 468, 470 (7th Cir. 1969)).

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Turning to the facts to the instant case, we are not prepared to say that the jury will necessarily not be able to find the existence of "one big . . . profitable enterprise." The government's proof would prima facie show a general agreement of understanding of conducting auction sales in the illegal manner described above. The separate agreements made between the marshals and the bidders at each sale do not necessarily indicate independent and competing conspiracies. Rather, the offer of proof indicates that because the defendants relied on "the boys" to attend the sales, bid in the assets at the pre-arranged deflated price, and pay the "top money," the success of each separate agreement was dependent upon the continuous cooperation of all of the participants. In short, the proof arguably shows that each transaction "was of one design and . . . was part of one basic and overriding plan," United States v. Parnell, 581 F.2d 1324, 1382 (10th Cir. 1978), or, in the words of the Second Circuit, shows that each agreement was in furtherance of "one general business venture." United States v. Tramunti, supra, 513 F.2d at 1106. Accordingly, we find no need to depart from the general rule that "[t]he question whether there are one or more conspiracies is primarily for the jury, since it is a question of fact as to the nature of the agreement." United States v. Finkelstein, 526 F.2d 517, 522 (2d Cir. 1975), cert. denied, 425 U.S. 960, 96 S. Ct. 1742 (1976).

We find count 1 of the indictment as expounded by the government to allege a single conspiracy under 18 U.S. § 1962(d). It follows that the argument for severance directed towards counts 1 and 2 must be rejected. Similarly, the motions for severance directed to the Hobbs Act violations (counts 3 to 15) and mail fraud (16 to 25) are denied./5

We also find that counts 16 to 25 allege violations of 18 U.S.C. § 1341. The question as to whether the mailing of the balance of the proceeds of the alleged illegal sales was for the purpose of executing such scheme is one for the jury.

All motions to dismiss and sever are denied, and it is

SO ORDERED.

The defendants are directed to attempt informal discovery by written request to the United States Attorney.

The time for making all pre-trial motions is extended to March 7, 1980, at which time the court will schedule a date for trial.

/s/ JACOB MISHLER
U. S. D. J.

FOOTNOTES

/1 The court's Memorandum of Decision dated January 22, 1980 rejected the notion that a single conspiracy could be established through the association that the marshals had with the Civil Court.

/2 See note 3 infra.

/3 It is clear the "the boys" are among those "other persons, known and unknown to the Grand Jury" whom the named defendants are charged as conspiring with.

/4 In Elliott, six defendants were charged with conspiring with more than 37 unindicted individuals to participate in the affairs of an enterprise through a pattern of racketeering activity, 18 U.S. C. § 1962(d). The conduct charged as constituting the pattern of racketeering activity included acts of arson, obstructing justice, fencing goods stolen from interstate commerce, murder, and dealing in narcotics. Significantly, these acts were not committed together by all the alleged conspirators. Rather, they were committed by individual defendants or by several of their number.

In affirming the convictions of 5 of the defendants, the court noted that they probably could not have been prosecuted for a single conspiracy under 18 U.S.C. § 371, in large part because "[t]he activities allegedly embraced by the illegal agreement in this case are simply too diverse to be tried together on the theory that participation in one activity necessarily implied awareness of the others." 571 F.2d at 902. However, by enacting RICO, Congress had largely eliminated the problem which would have barred prosecution, i.e., inferring a single agreement "from the commission of highly diverse crimes by apparently unrelated individuals."

> RICO creat[es] a substantive offense which ties together these diverse parties and crimes. Thus, the object of a RICO conspiracy is to violate a substantive RICO provision--here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity-- and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. The

> gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather it is that each agreed to participate, directly and indirectly in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs.

571 F.2d 902-03. The Court found that the evidence supported the conclusion that the defendants themselves constituted the statutorily defined "enterprise," see 18 U.S.C. § 1961(4), whose purpose was to "make[s] money from repeated criminal activity." 571 F.2d at 904. Thus, those who conspired to further the enterprise's affairs, albeit by diverse means, were properly convicted under 18 U.S.C. § 1962(d). 571 F.2d at 904-05.

The problem with applying this holding to the facts at bar is that the indictment here does not charge the defendants with conspiring to participate in the affairs of an "enterprise" comprised of the defendants themselves. Rather, the "enterprise" in whose affairs they are charged with participating is the Civil Court. However, as we noted above, we need not decide whether Elliott's reasoning--if it is correct, compare United States v. Sutton, 605 F.2d 260 (6th Cir. 1979) (defendants who committed the patterns of racketeering activity may

not themselves constitute an "enterprise" within the meaning of RICO)--could be applied to the instant situation. Nonetheless, we believe that the Elliott opinion does correctly reflect a belief that RICO represents a broadening of the law of conspiracy.

/5 The finding that the indictment properly charges a single conspiracy, together with the fact that all the offenses charged arise from the same "series of acts or transactions," and allegedly constituted "parts of a common scheme or plan," requires a finding that joinder was technically proper under Rule 8. See generally Schaffer v. United States, 362 U.S. 511, 80 S. Ct. 945 (1960). United States v. Una, 585 F.2d 1 4-5 (1st Cir. 1979). United States v. Bernstein, 533 F.2d 775, 789 (2d Cir.), cert. denied, 429 U.S. 998, 97 S. Ct. 523 (1976). As to whether a Rule 14 severance should be granted, we are not prepared at the present time to accept the defendants' conclusory allegations that they will necessarily be prejudiced by reason of the number of individual substantive acts charged in the indictment which the government will attempt to prove. See United States v. Stirling, 571 F.2d 708, 733 (2d Cir.), cert. denied, 439 U.S. 824, 93 S. Ct. 99 (1978) ("It is not sufficient merely to show that the accused would have had a better chance for acquittal at a separate trial.") In "balancing . . . the inconvenience to the Government and the judicial process of numerous separate trials against the inconvenience to the defendants of seeking appropriate limiting instructions," United States v. Kenny, supra, 462 F.2d at 1218, we believe, at least at the present time, that no severances are warranted. However, we are cognizant of our "continuing duty at all stages of the trial to grant a severance if prejudice does appear." Schaffer v. United States,

supra, 362 U.S. at 516. Accordingly, leave is granted to the defendant to renew their motions at a later time upon an appropriate showing.

APPENDIX F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Due Process Clause of the Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

18 U.S.C. § 1961(4):

> "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]"

18 U.S.C. § 1962(c):

> ". . . any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(a):

> "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or

invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purpose of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities or any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer."

18 U.S.C. § 1962(b):

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any evidence which is engage in, or the activities of which affect, interstate or foreign commerce."

Relevant Constitution and Statutory Provisions

18 U.S.C. § 1962(d):

> "The final substantive RICO crime makes it 'unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.'"